



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 40 OF 2019**

**(CORAM: F.M. GIKONYO J.)**

**(Being an appeal from the judgment of Hon. W. Juma (C.M) in Narok CMCR No. 523 of 2019 on 4/11/ 2019**

**LETIYIA OLE MAINE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**Forfeiture of instrumentality of crime**

1. The Accused person Francis Wambua was charged 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 18<sup>th</sup> day of August 2019 at about 12.30 p.m. At Entesekera Location in Loita Area in Narok south Sub-County within Narok County being the driver of a Mitsubishi lorry reg. no. KBN 961F was found ferrying 250 pieces of cedar posts from loita forest being a public forest without permit from chief conservator of forests, Narok. He was convicted of the charge and fined Kshs. 80,000/= in default nine months' imprisonment.
3. On 29/8/2019 the trial court summoned the owner of motor vehicle reg. no. KBN 961F to show cause why the lorry should not be forfeited to the state pursuant to Section 389A of the CPC.
4. On 25/10/2019 the owner of the lorry appeared in court through his counsel Mr. Kiruti to show cause why his lorry should not be forfeited.
5. On 4/11/2019 the trial court rendered its decision to the effect that the motor vehicle registration number KBN 967F be forfeited to the state.
6. The owner of the motor vehicle, the appellant herein being aggrieved by the said decision has lodged this appeal in which he raised four (4) grounds;

*i. That the learned magistrate erred in law and in fact by forfeiting the said motor vehicle KBN 961F by relying on unreliable evidence by the prosecution.*

*ii. That the learned magistrate erred in law by making a premature order for forfeiture of the motor vehicle.*

*iii. That the learned magistrate erred both in law and fact by ordering for forfeiture of motor vehicle KBN 961F which belongs to the appellant who was not in any way party to charges and was not an accused person nor an accomplice to the accused.*

*iv. That the learned magistrate erred in law and fact by failing to inquire into the ownership of the subject matter making the order for forfeiture.*

**The application for release**

7. The appellant vide application dated 29<sup>th</sup> August 2019 sought for orders to have the motor vehicle registration number KBN 961F Mitsubishi lorry being held at Ololulunga Police Station be released back to KAMPEI OLE KAUET the applicant/ interested party therein.
8. The application was based on the grounds that the said motor vehicle was being driven by Francis Mwaura and it was detained and the driver charged with transporting 250 cedar posts. The driver has since been penalized for the offence.
9. The Appellant attached a motor vehicle copy of records marked '**KOK 1(b)**' as proof of ownership. The vehicle is in the names of Equity Bank Ltd and Leteyia Ole Maine according to the log book marked '**KOK 1(a)**'
10. In his supporting affidavit he deposed that he is the owner of that vehicle, he knows that in view of the offence the vehicle can be forfeited. He is a law abiding citizen and would not have condoned or allowed the said vehicle being used in committing the offence.

11. The prosecution filed a replying affidavit sworn by CPL Walter Onyando of Ololulunga Police Post. He deposed in addition to the facts of the case that the same vehicle was involved in an earlier movement of 700 cedar posts where the driver escaped. He stated that the report was booked in their OB.NO.4/18/5/19 and 2/19/5/19. It was released to the owner vide OB.NO. 2/20/5/19 at Ewaso Ngiro Kenya wild life service camp. He further deposed that the applicant has not demonstrated reasonable diligence against the driver committing the offence and it was his designated driver.

12. Mr. Kiruti advocate for the applicant argued that the vehicle was ferrying the cedar posts, the driver has been punished for that offence and that the applicant did not consent the vehicle being used for that transportation. He argued that the driver was on his own frolics. On OB entries of earlier incident, he argued that the applicant was never arrested for transporting forest produce and wondered how someone would be released for transporting 700 posts. He further argued that the issue was never raised when the accused person was prosecuted.

13. The prosecutor argued that the same vehicle was reoffending as it had been involved in a prior similar incident. The driver had escaped and the vehicle released to its owner with a warning. She felt that the owner is using the motor vehicle to ferry forest produce and has not explained why the transportation should be done without a permit and same should be forfeited.

#### **APPELLANT'S SUBMISSION**

14. The Appellant reiterated the grounds of appeal and relied on the following authorities;- **David Chacha Kamau v Republic [2015] eKLR, Evans Lumumba Mochoge v Republic [2016] eKLR and Republic v Ministry of Internal Co-ordination & 2 others Ex parte Evans Nyakwara Makori [2016] eKLR**

15. The Appellant prayed that the appeal be allowed and the orders of forfeiture be quashed.

#### **RESPONDENT'S SUBMISSION**

16. The Respondent submitted that the prosecution tendered evidence that indeed the subject motor vehicle was found twice transporting forest produce.

17. The Respondent submitted that the owner of the subject motor vehicle was given sufficient notice on the time and place the notice to show cause would take place, that is, the court which had dealt with the substantive case. Forfeiture of the subject motor vehicle was not premature as it came after the hearing and determination of the substantive case, thereafter the owner was given summons to attend court to show cause. The Appellant attended but failed to give sufficient reasons why his vehicle should not be forfeited.

18. The Respondent submitted that indeed the Appellant was not the accused but his vehicle has been found twice to have transported forest produce. The Appellant failed to stop the act from continuing. The person who was charged for ferrying forest produce was an employee /servant of the appellant. The Appellant only said that transporting forest produce without permit is wrong and that it was done without his authority. The Appellant did not say what his driver was authorized to do on the material date.

19. The Respondent submitted that the ownership of the subject motor vehicle was not in dispute. The Appellant was summoned to court. He appeared in court and produced motor vehicle copy of records that showed that he was the owner of the subject motor vehicle.

20. The Respondent submitted that the decision on forfeiture made on 4<sup>th</sup> November 2019 was safe as against the Appellant and urged this court to uphold it.

#### **ANALYSIS AND DETERMINATION**

21. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See **Okeno vs. Republic [1972] E.A 32.**

22. In view of the above I have perused the lower court record, written submissions of both parties and authorities relied upon by the Appellant. I have considered the evidence adduced before the trial Court and the issue which arise for my determination is: -

**i. Whether the order on forfeiture of the motor vehicle was in violation of a constitutional right to a fair hearing, property, privacy and procedural due process.**

#### **Forfeiture: development and meaning**

23 Forfeiture of property the central issue in this appeal. What is forfeiture?

24. Forfeiture is divestiture or confiscation of one's property in consequence of a crime, offense, or breach of obligation. The **UN Nations Convention against Corruption[1] (UNCAC)** defines 'Confiscation' as *the permanent deprivation of property by order of a court or other competent authority.*

25. The forfeiture concept has flourished beyond the initial confiscation of property as a means of enforcing customs and revenue laws, to the forfeiture of property used in or connected with the commission of crime or proceeds of crime as a way of combating crime. But its growth has witnessed harsh and arbitrary practices. The surrogate incubation of modern forfeiture was in a harsh and hostile practice called the *attainder*. The *attainder*[2] is an order that was issued against a person who has been convicted of a felony or declared an out-cast in

society; the order permanently deprived the attainer of all civil rights including the right to property [3] irrespective of whether the property is associated with or connected to any crime. Under the Feudal law, the property so taken was referred to as “*deodand*” which means in Latin “given to God”. This kind of divestiture of property of the subject was quite draconian; and it did not afford the subject any due process whatsoever.

26. However, with time, the law developed several forfeiture systems. Common law of England which is applicable in Kenya [4] also developed systems of forfeiture of property by the state. The systems derive from the writ of escheat [5]. According to Justice Blackburn [6], common law developed three types of forfeiture namely;

1. *Deodand* which referred to forfeiture of property belonging to the King’s deceased subject;
2. Attainder which refers to forfeiture of property of a person who has been convicted of a felony; and
3. Forfeiture of property used in contravention of or acquired through evasion of tax or custom or revenue laws.

27. The indiscriminate taking away of the property rights of wrong doers was greatly mitigated by the latter development, and confiscation of assets was confined to property used in or acquired through evasion of tax or custom or revenue laws. As entrenchment of the Bill of Rights became widespread, the practice expanded further following legislative innovations by nations based on international instruments on asset recovery; the scope of recovery was now of a wide range of recovery of what is commonly known as illicit property or proceed of crime or instrumentalities of crime. Due process was also entrenched in the constitutions of states to guarantee property rights and right to privacy of its citizens.

28. It is significant to note the three phrases- “*used in or in connection with the commission of crime*” or “*proceeds of crime*”- are part of the legal terms used in our law which bear technical and specific legal meaning. Properties “*used in or in connection with commission of crime*” are ordinarily referred to as “*instrumentalities of crime*”- the use may be wholly or in part, whilst “*proceeds of crime*” refer to “*any property derived from or obtained, directly or indirectly, through the commission of an offence*” [7]. These terms have been used in our laws substantially borrowing from international and regional treaties and conventions that Kenya has ratified such as **United Nations Convention against Corruption (UNCAC)**, **United Nations Convention against Transnational Organized Crime (UNCTAOC)**, **AU Convention for Combating Corruption**.

29. Forfeiture may be ordered in a civil or criminal proceeding- a subject that may found a complete PhD. thesis. But, this decision is concerned with forfeiture within a criminal proceeding and in particular in section 68 of the Forest Conservation and Management Act and section 389A of the CPC.

30. With the foregoing knowledge of historical development of forfeiture, it will be impossible not to have much appreciation of the centrality of due process in forfeiture determination.

### **Due process**

31. According to section 24(f) of the Penal Code, forfeiture is one of the punishments that a court may inflict. Of greater significance, is that, forfeiture divests a person’s property without compensation, hence, need to ensure the process leading to forfeiture adheres to the requirements of due process to avert constitutional defenses of violation of right to property, right to privacy, right to fair administrative action, and right to fair trial guaranteed in article 40, 31, 47 and 50 of the Constitution, respectively. The person who will lose the property must be afforded due process; the person may be a third party or the accused person.

32. Some of due process protections before forfeiture order is made include notice- replete with essential details and information *inter alia* on the time and place of, forfeiture proceeding and property to be forfeited- to the person who will be affected by the forfeiture to attend forfeiture hearing and determination. The trial court must conduct an inquiry or hearing for forfeiture. The person who will be affected by the forfeiture order is allowed to participate in the forfeiture proceedings and tender evidence to show cause why the property should not be forfeited. He may also appear through legal counsel or in person. The trial court then considers all relevant evidence tendered in the trial and the forfeiture proceeding in making its determination.

### **Forfeiture in Forest Conservation and Management Act**

33. A careful discernment of the record as a whole, show 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.”*

34. 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:*

35. 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.

36. Some courts have taken the view that the expression of the word “*may in addition...order*” makes the additional orders on compensation or forfeiture discretionally. Thus, this 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.

37. 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. It is not a defence 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 harsh limitation by recognizing a so-called *innocent owner* defense, but 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; it is 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.

38. 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**

39. The begging 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.

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

### **Prosecution’s burden**

41. The question is whether the prosecution proved to the satisfaction of the court that the property ought to be forfeited?

42. 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.*

43. 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.

#### **Ownership and registration of lorry**

44. The evidence established that the Appellant is the registered and beneficial owner of motor vehicle registration number KBN 961F Mitsubishi lorry. Similarly, it is not disputed that the accused herein one Francis Wambua was the appellant's designated driver of lorry reg. no. KBN961F. Therefore, arguments that the ownership and registration number of the vehicle in question was not determined is not defensible whatsoever.

#### **Instrumentality of crime**

45. 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 lorry and the commission of the offence. Additionally, there was sufficient evidence through OB entries that the vehicle had been used previously to ferry forest produce but was released to the owner with a warning. The applicant attempted to take a defence that no one was charged with the offence. But, for purposes of forfeiture such is relevant evidence towards and corroborates culpable willful negligence on the part of the owner of the lorry.

46. 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.

47. 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.

48. Accordingly, this Court finds no merit in the appeal and it is hereby dismissed.

**Dated, Signed and Delivered at Narok Through Microsoft Teams Online Application This 27<sup>th</sup> Day of July, 2021**

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**F. M. GIKONYO**

**JUDGE**

**In the presence of:**

1. Mr. Karanja for the Respondent
2. Ms. Obondo for Onduso for Appellant
3. Appellant - absent
4. Mr. Kasaso – CA

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**F. M. GIKONYO**

**JUDGE**

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[1] Art. 2 para G

[2] Black's law dictionary

[3] Chitty J, *A Practical Treatise of the Criminal Law* 725 (2<sup>nd</sup> ed. 1826)

[4] *The Constitution and the Judicature Act*

[5] *Reversion of land ownership to the lord or crown when the immediate tenant or owner respectively dies without neither legal heirs or will*

[6] See *Austin v United States* 509 US 602 (1993), *Usury v United States* (1996) 135 Led 2 D 549

[7] para E, Art. 2 of the UNCAC