REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 18 & 19 OF 2020

JONES NZIOKA.....1ST APPELLANT

TITUS KAREITHI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original conviction and sentence in Criminal Case No. 247 of 2020 &

248 of 2020 of the Chief Magistrate's Court at Malindi – Hon. Ivy Wasike (SRM))

Coram: Hon. Justice R. Nyakundi

Ms. Mwania for the appellants

Ms. Sombo for the State

RULING

The state charged, **Jones Nzioka** and **Titus Kareithi** with two counts of contravening provisions, control or suppression of Covid-19 directions issued by the Cabinet Secretary pursuant to Section 36 (m) as read with Section 164 of the Public Health Act. The particulars of the indictments as framed, by the prosecution were that on 31st March 2020 at Majengo area in Malindi Sub-County, within Kilifi County at 1930hrs the accused was found selling assorted alcoholic drinks in Connection Bar and Amigos in contravention of directions issued by the Cabinet Secretary for health on prevention, control or suppression of Covid-19. The cases numbers in question are as indexed in Criminal case 247 and 248 of 2020.

On 7.5.2020, the accused on their own plea of guilty before **Hon. Ivy Wasike (SRM)** were duly convicted and sentenced to a fine of Kshs.20,000/= each in default one (1) month imprisonment. Further, the Learned trial Magistrate forfeited the inventory of exhibits which comprised of assorted soft and alcoholic drinks to the state for final destruction under the supervision of the Court.

Being aggrieved with the order on forfeiture, the appellants approached this Court to review the decision on the following grounds:

> ***(1). That the Learned trial Magistrate erred in Law and fact in forfeiting the goods to the state without giving them an opportunity to be heard.***
>
> ***(2). That the Learned trial Magistrate erred in Law and fact by rendering the goods to be liable for forfeiture without receiving any mitigation.***
>
> ***(3). That the effect of forfeiture in form and substance is an infringement of their social-economic rights and implied right on private property, as provided for in the Constitution.***
>
> ***(4). That the sentence of forfeiture according to the appellants amounted to double punishment which was not only prejudicial but also disproportionate to the nature of the crime.***

Against this background **Ms. Mwania** Learned Counsel for the appellants pressed for the appeal on forfeiture to be allowed and declared it to be inconsistent with Section 389A of the Criminal Procedure Code. Further Learned Counsel submitted that the Learned trial Magistrate failed to take necessary steps to issue notice and admit the issue for hearing before making an order on forfeiture. Similarly, **Ms. Sombo** for

the state in her submissions conceded that in the circumstances of the appeal, Section 389A of the Criminal Procedure Code was never adhered to by the Learned trial Magistrate.

Determination

The principles governing the weight to be given to such appeals are clearly set out in **Okeno v R {1972} EA 32, Kiilu & Another v Republic {2005} IKLR 174.** In appeals against conclusions of a trial Court, the first appellate Court approach is by way of a rehearing and examination of the evidence afresh, giving due regard to greater advantage, the Learned trial Magistrate may have had as a primary Court.

Bearing in mind these matters, the appeal Court conducting a review of the trial Court decision will not conclude that the decision was wrong simply because it is not the decision the appeal Judge would have made had he or she been called upon to make it in the Court below. Something more is required than personal unease and something less than perversity has to be established. **(See Nance v British Columbia Electric Railway Co. Ltd (4 {1951} AC 601) at 613).**

On appeal it is not disputed by both counsels that the plea of guilty to the charges offered by the appellants for the respective offences and after the facts had been read was in consonant with the principles in **Adan v Republic {1973} EA 445.**

In this particular case there is therefore no irregularity to render the plea of guilty and subsequent conviction and sentence defective. Furthermore, the grounds in each memorandum of appeal were not in any sense on the illegality of the plea of guilty, conviction or sentence. Their appeals are mainly on the ground that the Learned trial Magistrate misdirected herself in holding that the goods were liable for forfeiture and breach of the due process before the final order.

The Law

The **third edition of Hallsburys Laws of England Vol 10 at paragraph 987** stated as follows regarding the effect of a misdirection in Law or fact:

> ***"In order to avail an appellant, a wrong decision of the Court of trial on the question of Law must be in a matter of substance. If it relates to the wrongful admission or exclusion of evidence, the Court of Appeal will consider the probable effect of the minds of the jury of that evidence. If misdirection as to the Law applicable is established, the appeal will be allowed, unless it can be shown by the prosecution that the jury must have convicted had there been a proper direction."***

More apposite to the present case is this passage occurring in **Archbold's criminal pleading, evidence and practice 4th Edition Vol 11**

> ***"A material irregularity may arise in the course of a trial where there has been misdirection or an erroneous decision by the Judge on a matter relating to the evidence."***

Reverting to the appellants memorandum of appeal, it is clear that the general principles on forfeiture should follow the procedure set out under Section 389A of the Criminal Procedure Code:

> ***"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."***

Having taken the submissions by both sides on the aspect of forfeiture, it is clear from the appellant's counsel that the Learned trial Magistrate misdirected herself in addressing the issue of forfeiture outside the terms laid down in Section 389A of the code. That no evidence had been introduced as to the ownership of goods or things set to be forfeited to the state. The point of Law raised in this appeal goes to the root of Section 389A of the Criminal Procedure code as to whether the trial Court in so deciding to forfeit the goods satisfied itself as to the procedure expressed in the provisions.

From the record, the way things got underway shows that the trial Court though seized of jurisdiction erred in not giving the appellants an opportunity to be heard before an order of forfeiture was made after conviction and sentence. This radical conclusion required the Learned trial Magistrate to enter on the inquiry and to decide this particular issue distinctively with that of conviction and sentence. Furthermore, Covid -19 directions by the Cabinet Secretary pursuant to Section 36 (m) as read with Section 164 of the Public Health Act do not provide automatic forfeiture of exhibits produced in support of the commission of the offence.

It is fundamental that even where there is automatic forfeiture on the proceeds of crime or a vessel and article used in the commission of the offence both sides should be heard to form a base for the decision.

In the case of **Ridge v Baldwin {1964} AC 40** the Court held interalia:

> ***"That a person having legal authority to determine a question affecting the rights of individuals. This being so it is a necessary implication that he is required to observe the principles of natural justice when exercising that authority, and if he fails to do so, his purported decisions is a nullity. The universality of the right to a fair hearing, whether the cases concern property or tenure***

of an office, or membership of an institution are all governed by one principle."

It is clear that the Learned trial Magistrate resolved this question without a fair hearing and due process of the Law as contemplated in Article 50 of our Constitution. Further, be that as it may, a conclusion on this point was ultimately disposed of without the duty of giving reasons by the Learned trial Magistrate. A crucial issue to the resolution of issues between the parties ought to be founded on reasons in support or against the decision. It was on this basis the **House of Lords in South Bucks District Council v Porter No. 2 {2004} UKHL 33 1 WLR 1953** stated as follows:

> ***"The reason for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any issue of Law or fact was resolved. Reasons can be briefly stated, the degree of particularly required, depending entirely on the nature of the issues falling for decision."***

As seen from the record, in the instant appeal, duty to exercise jurisdiction also calls for the obligations on the part of the trial Court to give reasons according to Law. Though this appeal as the Law stands is governed under the Criminal Procedure Code and the Public Health Act, the tide on its resolution can be deprived from the principles in the leading case expounded on this by **Lord Diplock in the Council of Civil Service Unions v Minister for the Civil Service {1985} A.C.**

> ***"where a decision of an inferior Court can be reviewed on grounds of illegality, irrationality and procedural impropriety. Illegality means that the decision-maker must understand correctly the Law that regulates his decision making power and must give effect to it irrationality." Or what is often also referred to as Wednesbury unreasonableness applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. "procedural impropriety." Covers failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision, as well as failure to observe procedural rules that are expressly laid down even where such failure does not involve denial of natural justice."***

In addition, the guidance given by Lord Lowry in the case of **R v Secretary of State for the Home Department ex-parte Brid {1991} ALL ER cited with approval the following statement from Hallsburys Laws of England (Vol 1(1) at paragraph 78** requires a Court to first construe the doctrine of proportionality. Here is something basic:

> ***"Proportionality: The Courts will quash exercise of discretionary power in which there is not a reasonable relationship between the objective which is sought to be achieved and the means used to that end or where punishment imposed by the administrative bodies or inferior Courts are wholly out of proportion to the relevant misconduct. The principle of proportionality is well established in Law and is regarded as one indication of manifest unreasonableness weighing the actual purpose that was identified by the Learned trial Magistrate the range of permissible alternatives ought to have been scrutinized before an order for forfeiture was determined in accordance with the Law. There has to be a fair balance being struck between the rights of the appellants and the interests of society which is inherent in the whole Constitution."***

I would stress that bearing in mind the facts and circumstances of the Criminal Case Number 247 of 2020 and 248 of 2020 as well as the state appreciation, to control or suppression of Covid- 19, I am of the view that the Learned trial Magistrate failed to achieve a fair balance between the sentence of Kshs.20,000/= in default one year imprisonment and subsequent forfeiture of the goods seized from the scene of crime.

Moreover, the factors under Covid -19 pandemic taken together and non-compliance by the appellants must be considered against the adverse economic effect that the seizure and confiscation of the property would occasion the owners who had a legitimate expectation on return of investment.

In my opinion, such a deprivation of private property by way of a penalty is incompatible with the proportionality test in sentencing of an offender in this case. In this context where there is no fault at all on the part of the owner, it is fair that the goods be returned after conviction and sentence of the accused in a criminal case. On the basis of the above analysis, the discretion to impose both a fine of Kshs.20,000/= in default one year imprisonment and in addition an order for forfeiture of the property proven to be goods used for the commission of the crime was in the context of this appeal irregular, illegal and wrong exercise of discretion.

I am satisfied that an order of forfeiture was in contradiction with Section 389A of the Criminal Procedure Code and to make them subject for forfeiture was inevitably against the principles of fairness or natural justice. Keeping these principles in mind I am unable to agree that the properly seized can be classified as property from the proceeds of crime obtained or derived directly or indirectly as a result of the commission of a designated offence under Section 164 of the Public Health Act.

To address this concern parliament provided an avenue under Section 389A of the Code which permits any person with an interest in the property, including accused persons to apply for a restoration order or authorization of the release of the seized and forfeited property.

It follows, therefore that the appeal is hereby allowed in particular goods and items identified by the appellants in the inventory attached to the record of appeal claimed as recoverable be returned as a whole with no costs as to storage or handling charges.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 30TH DAY OF JUNE, 2020

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R. NYAKUNDI

JUDGE