



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT LODWAR

HIGH COURT CRIMINAL APPEAL NO. 6 OF 2017

JOHN MBURU.....1ST APPELLANT

JOSEPHAT MUTEMBEI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(By an appeal from conviction and sentence in original

Lodwar PMCR 39 of 2017 delivered on 19/1/2017

by CM Wekesa Senior Resident Magistrate)

JUDGMENT

The 2nd appellant **Josphat Mutembei** was charged with **John Mburu** in the Principal Magistrate's court with the offence in count 1 of gambling by unauthorized gaming machine contrary to section 53(1) of the betting, lotteries and gaming act Cap 131 Laws of Kenya.

The particulars of the offence are that on the 17th day of January, 2017 at Lodwar Township in Turkana Central Sub-county within Turkana County were jointly found operating unauthorized gaming machine "Lotto" for the purposes at soliciting money from members of the public without a license for 2017 issued by Betting Lotteries and Gaming Authority.

In count 2 they were charged with gambling in a public place contrary to section 55(1) as read with the same section of the betting, lotteries and gaming Act cap 131 laws of Kenya.

The particulars of the offence are that **JOHN MBURU AND JOSPHAT MUTEMBEI** on the 17th day of January 2017 at Lodwar Township in Turkana Central sub-county within Turkana County were jointly found gaming in a public place for purpose of soliciting money from members of the public without a license issue by betting, lotteries and gaming authority.

The charges were read to the appellants on 18/1/2017 and they all pleaded guilty. The facts were narrated by the prosecution which facts they admitted to be correct. They were then convicted on both counts and fined KShs.3000 in default to serve 2 months imprisonment. On 19/1/2017 the gaming machine which were produced as exhibits were forfeited to state.

The appellant has appealed to this court on one ground only.

(a) That the order of the trial magistrate directing that the machine be forfeited to the state be set aside.

The appellant filed written submissions. He submits that the appeal is against conviction as the offence was not proved beyond measurable doubt and in particular there was no evidence adduced on how he was arrested. Mr. Gikunda for the state supported the appeal to the extent of release of the exhibits to the appellant. He submits that the conviction was proper but the forfeiture is not premised on any provisions of the Gaming Act.

On the issue of conviction, which the appellants challenges in his submission, I note that it was based on a plea of guilty. The record of the proceedings as of 18/1/2017 shows:

The substance of the charge and every element thereof has been stated by the court to the accused person in the language that they understand who being asked whether they admit or denies the truth of the charge reply in English/Kiswahili/Turkana

Accused 1- it is true

Accused 2 – it is true

Count II

Accused 1 – it is true

Accused 2 – it is true

Court – plea of not guilty entered for both.

Prosecutor – on 17/1/2017 at around 11.00hrs within Lodwar township, there was a normal crack down led by chief Inspector Gogo with other police officers that is when they saw some gambling machine; three in number and the accused persons John Mburu and Josephat Mutembei were found gambling with those machines commonly known as Lotto without the licence subsequently both the accused persons were arrested and escorted to Lodwar Police Station; the said machines are before this court and may be produced as P exhibit No.1 a b and c respectively. That is all.

Accused 1 – facts are correct

Accused 2 – facts are correct

Court – each of the accused is convicted for pleading guilty to the charge.

From the above it is clear that the charge was read to the appellant and every element explained to which they pleaded guilty. The facts were narrated by the prosecution which the appellant admitted as correct. They were then convicted on own plea of guilty there is no allegations on any defect in the charge or interpretation. I find that the plea of guilty entered was unequivocal and therefore proper.

Having been convicted on own plea of guilty, the appellant cannot in this appeal challenge this conviction. Section 348 of the civil procedure code provides

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence. The appellant having pleaded guilty, an appeal against conviction is not available to him

The main issue raised in this appeal is whether the order for forfeiture of the gaming machines was proper. The appellant were charged in count 1 with the Gambling by an unauthorized gaming machine contrary to section 53 (1) (a) of the act which provides:

Sec 53(1) (a) A person who –

(a) Uses or permits the use of an unauthorized gaming machine; or

(b) Knowingly allows premises to be used for the purpose of gaming by means of an unauthorized gaming machine; or

(c) Knowing or having reasonable cause to suspect that premises would be used for gaming by means of an unauthorized gaming machine

(i) Caused or allowed the machine to be placed on the premises; or Let the premises, or otherwise made the premises available, to a person by whom an offence in connection with the machine was committed **Shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding six months or, to both.**

In count 2 they were charged with gaming in a public place contrary to section 55 (1) of the Act which provides

“A person who takes part in gaming in a street or other place to which, whether on payment or otherwise, the public have or may have access, shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months or to both”.

The exhibits the 3 gaming machines commonly called Lotto that the appellant were found with in the commission of the offence subject to the charge were produced as exhibits. Exhibit 1 (a) (b) (c). On 19/1/2017 the prosecutor applied that they be released to the owners.

Prosecutor – I apply that the exhibits be returned to the owner

Court – the application is disallowed since they were used to perpetrate an illegality. The exhibits to be forfeited to the state.

It is this order of forfeiture that the appellant challenges and the state supports him.

Forfeiture is a punishment in our laws where the offender loses all his interest in property which is taken over by the state or its agents. It is a penalty against the offender in respect of the property used in the commission of an offence. Before a court can impose the penalty of forfeiture, the accused must be convicted of the offence; the court should establish ownership of the property; and finally the court must give the accused an opportunity to show cause why the property should not be forfeited to state. Where it is shown to the satisfaction of the court that the do property is owned by another person other than the accused, that other person must be given an opportunity to be heard before a forfeiture order is made. The court must also determine whether there is a forfeiture provision in the Act under which the accused is charged.

Sec 67 of the Betting lotteries and Gaming Act Provides;

The court by or before which any person is convicted of any offence under this Act may order anything produced to the court and show to the satisfaction of the court to relate to the offence to be forfeited and either destroyed or dealt with in such other manner as the court may order.

This provision empowers the court which convicted the appellant to forfeit the gaming machine which were produced as exhibit and which relate to the offence for which the appellant was charged. It is not therefore correct as Mr. Gikunda submits that there is no provision for forfeiture under the Act. The trial court having found that the gaming machine relate to the offence, the order for forfeiture of the same was proper and legal. In the result I find no merit in this appeal and the same is dismissed.

Dated at Lodwar this 12th day of February, 2018.

S N RIECHI

JUDGE