REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL REVISION NO 3 OF 2018

DENNIS MANDELA KYALO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

Being a revision from the decision by Hon. S. Shitubi,

***C.M in Criminal Case N o. 74 of 2018 at Kajiado*.**

RULING

The applicant through Ms. Itaya & co. Advocates filed this notice of motion dated 12th February, 2018 seeking revision against the orders on forfeiture issued by the learned trial Magistrate on 16th January, 2018 in criminal case No. 74 of 2018. In the said order the Chief Magistrate directed and ordered that the Gaming Machines admitted as exhibits in the trial of the applicant be forfeited to the state.

It is contended by the applicant in his affidavit that he is the ***bone fide*** owner of the gaming machines. That during the forfeiture proceedings he was not given an opportunity to show cause why the order should not be granted. That by virtue of the forfeiture his rights to property have been violated.

The genesis of this case is very brief. The applicant was indicted before the chief magistrate court with the offence of gambling in public place contrary to **Section 55(1)** of the Betting, Lotteries Gambling Act 131 of the Laws of Kenya. The particulars in the charge sheet alleged that on 15th January, 2018 at Kisaju centre, Isinya sub-county the applicant was found gambling in public place for money using Gambling Machines (slot Machines). The applicant pleaded guilty to the charge in which he was convicted and sentenced to a fine of Kshs.10,000/- in default three months imprisonment. In addition the learned trial Magistrate made an order to forfeit the gambling machines to the state.

Being aggrieved by the said order on forfeiture, the applicant filed a revision before this court. In support of the revision are the grounds in the body of the notice of motion and an affidavit by the applicant. The applicant deposes in his affidavit that the court lacked jurisdiction to order for forfeiture. Secondly, by ordering forfeiture of the Gambling Machines, his rights to property were violated. Thirdly, the order on forfeiture was made without reference to the owner of the machines.

Mr Itaya, learned counsel for the applicant challenged the issuance of the order on grounds that the learned trial magistrate did not give an opportunity to the applicant to be heard before the final order on forfeiture. Learned counsel invited the court to apply the provisions of section 177 of the Criminal Procedure Code on restitution of the property to the owner in criminal proceedings. Learned counsel further submitted that the applicant was not served with notice and that breach by the trial court warrants this court to revise the order by setting it aside.

Mr. Akula for the respondent in a rejoinder made submissions and contended that the record has no irregularity, error or omission or the merit to entertain the application.

Analysis and determination

I have considered the notice of motion and submissions by the learned counsel for the applicant and also learned prosecution counsel for the respondent.

The applicable law

In this application, a revision has been preferred against the order of the trial magistrate under Article 165 (6) and (7) of the constitution and further to the provisions of section 362 of the Criminal Procedure Code. The two provisions vests in the High Court with concurrent supervisory and revisional jurisdiction over subordinate courts and inferior tribunals. It is settled that under section 165 (6) and (7) of the constitution the High Court has a continuous supervisory jurisdiction to call and examine the record of the inferior courts and tribunals to make any order or give any direction it considers appropriate to ensure the fair administration of justice. The criminal justice's system of Kenya is anchored under Article 50 of the constitution on the right to a fair trial. The cardinal objective in any criminal trial is to protect the human rights of the defendant facing trial, render justice and punish the one found guilty through the due process of the law in passing the appropriate punishment.

In relation to the jurisdiction on matters arising from the Magistrate's Court, the high court exercises powers vested by the constitution to make orders of review, revision, mandamus, prohibition and or certiorari. Furthermore a convicted person has a right of appeal against conviction and sentence from an inferior court.

The current avenue chosen by the applicant was that of revision review Section 362 as read with Section 364 of the Criminal Procedure Code (Cap 75 of the laws of Kenya).

In exercising revisionary powers pursuant to Section 362 and 364 our code provides as follows:

> ***"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."***
>
> ***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 in the case of 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; in the case of any other order than an order of acquittal, alter or reverse the order.***
>
> ***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.***
>
> ***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;***
>
> ***Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction;***
>
> ***When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed."***

What is being challenged by the applicant through learned counsel Mr. Itaya is the manner in which an order of forfeiture was made by the chief magistrate on 16th January, 2016.

However under article 165 (6) and (7) as read with section 362 of the Criminal Procedure Code the court is not precluded in exerting jurisdiction in reviewing the entire record before it. This is for the court to satisfy itself at to the propriety, correctness or regality of the proceedings which gave rise to the impugned order. The court may either affirm, reverse or vary any part of the magistrate's decision or remit the matter back for retrial on the disposal.

In the instant case is the order made by the learned trial magistrate to forfeit the gaming machine, wrong, incorrect, improper and or illegal?

Mr. Itaya learned counsel for the applicant contended that the court did not notify nor conduct proceedings on forfeiture. In that regard the forfeiture order dealt with by the leaned trial Magistrate was irregular and improper. On his part learned prosecution counsel maintained that there was no irregularity or impropriety in the order on forfeiture.

I have perused and examined the record in criminal case no 74 of 2018. It is clear that after convicting and sentencing the applicant on his own plea of guilty, the learned magistrate made an order of forfeiture of the Gaming Machines. Thereafter the applicant complained that he was not heard and his rights to private property were violated by the impugned order.

From my reading of Section 67 of the power of the court to forfeit anything produced under the provisions of this Act is not mandatory. The court has to determine that there is a probable cause to believe that the property seized is a subject of forfeiture. This is more so because criminal assets for forfeiture does raise serious impasse between public interest and constitutional rights to private property.

As far as the charge facing the applicant was concerned he pleaded to the offence of Gambling in a public place contrary to section 55 (1) of the betting, Lotteries and Gambling Act. He was convicted and sentenced accordingly.

To enable the trial court to adjudicate on the issue of forfeiture following the facts placed before it by the prosecution, the parameters of

section 67 of the Act had to be applied. The section provides as follows:

> ***"the court by or before which any person is convicted of any offence under this Act may order anything produced to the court and shown 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"***

The Betting, Lotteries and Gaming Act does not provide for a detailed procedure on criminal forfeiture. In this regard trial courts should draw assistance from the provisions of Section 389A of the Criminal Procedure Code.

Under this Section the forfeiture stage entails an inquiry by the convicting courts as to the ownership of the confiscated asset or property. During the forfeiture proceedings which happens after a conviction an application by the prosecutor is necessary to lay a basis at the trial as contemplated in Section 389A of the Criminal Procedure Code.

Any person other than the accused asserting the legal interest in the property which is a subject of forfeiture is to be accorded an opportunity to be hear before the final order. This is where the court is presented with evidence on right to title, interest, circumstances of acquisition and additional facts supporting the claimant's interest in the property.

As I see it all that is necessary is for the court to conduct an inquiry whether the goods or things subject matter of the criminal trial should be forfeited to the state. As it stated in Section 67 of the Act and the criminal code the court has to establish sufficient link between an offence and the ownership of the property subject matter of the criminal proceedings. Secondly, a consideration whether there is anything in those facts placed before the court that offends the law to warrant forfeiture of the items, property or goods to the state.

The fact that a person has been prosecuted for an offence under the Betting, Lotteries and gaming Act does not leave it open the possibility of an automatic forfeiture of property mentioned in the charge sheet. This is more so where the accused person before court might not be the one with the legal interest or right to ownership. Many a times I have come across forfeiture of chattels, vehicles or vessels whose legal instruments as to title has not been established by the state or the court.

The wider test of an injustice being occasioned could be avoided in resorting to the provisions of section 67 of the Act as read together with section 389A of our code for parties to be invited to show sufficient cause why forfeiture should not issue.

It follows that forfeiture is creature of the statute, though a criminal offence may trigger forfeiture, judicial forfeiture proceedings ought to be conducted by the trial court. In the interest of justice the state must move the court with reasons why it deems necessary for the property, things or goods produced as exhibits should be forfeited at the conclusion of the trial.

The seizure of the goods during an arrest of the offender is not in itself sufficient for the court to invoke provisions on forfeiture. The ownership of the property to be subjected to forfeiture must be established by way of evidence.

I am of the considered view that due process required notice be circulated under all circumstances for the interested party to be afforded an opportunity to be heard on the matter. The trial court failed to honour the due process obligation to the applicant or any other interested party. In such cases like the one before me upon conviction the court may order forfeiture of the property in accordance to section 67 of the Betting, Lotteries and Gaming Act cap 131 as read together with the procedure set out in section 389A of the Criminal Procedure Code. **(cap. 75 of the laws of Kenya**).

The current impugned order appears to me to fall short of the legal threshold under the statute. As consequence the order is hereby set aside on grounds of being irregular, improper and incorrect that occasioned prejudice and a failure of justice. The pertinent statute cap.131 of the laws of Kenya provides for the definition of Gaming Machines. The same Act provides for licensing and offences ensuing thereto for the use of the said machines (see Section 53 of the Act). Section 54 of the Act provides for the powers of the Board to authorize the use of Gaming Machines. The entire proceedings before the session Chief Magistrate did not give reasons as to the forfeiture order or the offending provisions of the statute which compelled her to grant the ***Suo Moto*** order of forfeiture of the seized gaming machines.

We are not even told whether an inquiry on licenses of the gaming machine was considered by the police officers who confiscated and had them produced as exhibits.

In short this revision is allowed on the grounds that Section 67 of the Act is not mandatory. The state did not apply for forfeiture of the property there was no notice published or served to a third party who might have a legal interest in the property.

The ownership of the property forfeited to the state was not established in the court's decision, we are not even told whether the gaming machines were to be destroyed or mode of disposal. Entering a final order on account of the trial court own motion offends procedural protections which limits the state authority to seize certain property with no advance notice or opportunity to be heard. In addition this court considers criminal forfeitures as additional penalties imposed against an accused person for his or her criminal behavior. The trial court must not loose sight that punishment should not be disproportionate to the gravity of the offence and therefore punitive or excessive in the circumstances of a specific case.

For this reasons I set aside the forfeiture order and do hereby remit the primary file to the Chief Magistrate Court for a retrial and disposal on the issue in accordance with Section 67 of the Act and the dictates of the criminal procedure code.

It is desirable before I pen off I make reference to the court record for what unfolded in the judicial proceedings to determine whether the manner in which the decision was made was regular or correct.

At the hearing of this revision I am able to examine the facts and entire record of the lower court. On the proven facts the applicant was sentenced pursuant to Section 55 (1) of the Betting, Lotteries and Gaming Act. The penalty section provides as follows;

> "***any person found guilty of an offence on Gaming in public place shall be liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months or both"***

The learned trial Magistrate imposed a fine of Kshs 10,000 in default or three months imprisonment. The penalty range from section 55(1) of the Act is that a fine of Kshs three thousand as the upper limit in default three months or both. The definitions of offences and the maximum sentences under the Betting, Lotteries and Gaming Act are prescribed by parliament.

In exercising discretion on sentence trial courts must apply these provisions and decide within their limits. A court must determine and give effect to the purpose and objective of the legislature by reading the entire language of the statute. It is important to note that the accused pleaded guilty to the offence upon which he was convicted. The trial court heard from the accused that he was a first offender and remorseful. In considering the appropriate sentence and penalty under Section 55(1) of the Act the trial Magistrate had all at her disposal provisions of the law, mitigation and any aggravating factors. How the sentence of a fine of Kshs. 10,000 in default three months was arrived is not clear from the record as it offends Section 55(1) of the Act.

It is our duty as the first appellate court to consider the relevant materials placed before me regarding a case of this nature. Pursuant to the principles in the case of ***Shadrack Kipchoge Kogo v. Republic Cr. Appeal No. 253 of 2003.*** An appellate court can and will interfere in a sentence imposed by the lower court when the following grounds exist.

(a) **First the sentencing magistrate has made a wrong decision against the proper factual basis of the case.**

(b) **There has been an error on the part of the trial court in appreciating the law and the material before her and or him.**

(c) **That the sentence was wrong in principle and the same was manifestly excessive or punitive.**

(d) **That the sentence occasioned a failure of justice.**

Applying the above principles to the facts of the present case I have come to the conclusion that the offence committed by the applicants did not attract a fine of Kshs. 10,000 but that of Kshs. 3000 in default 3 months. This means that the sums total of Kshs.10,000 was not a creature of the Act but wrong application of law by the trial magistrate. It is expected that reference be made to the law by the trial court to reconfirm the language creating the penalty section of the offence before exercising discretion to pass the appropriate sentence. This does not seem to have been the case before the learned magistrate.

To this extent although the relief on sentence was not raised in the notice of motion it will be erroneous not to interfere with it under the principles cited in the **Kogo case Supra**, in view, of the fact that such penalty was not authorized by statute. The sentence of Kshs.10,000 is hereby set aside and substituted with that of Kshs. 3000 in default 3 months imprisonment. The excess fine of Kshs. 7000 be refunded to the applicant.

Accordingly, the earlier motion on forfeiture proceedings succeeds with an order for retrial before the Chief Magistrate.

Dated, Delivered and Signed on 21st day of March, 2018.

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R. NYAKUNDI

JUDGE

In the presence:

Mr. Itaya for the applicant

Mr. Akula for the DPP for the Respondent

The applicant present