



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL REVISION NO 4 OF 2018

JAMES WANJEMA.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

Being a revision from the decision of the Chief Magistrates court in Criminal Case No. 75 of 2018 at Kajiado.

RULING

David Musau was charged, convicted, and sentenced of the offence of Gambling in a public place contrary to section 55 (1) of the Betting and Gambling Act Cap. 131 of the Laws of Kenya.

Following his own pleas of guilty the trial Magistrate sentenced him to a fine of Kshs 10,000/- in default three months imprisonment. From the record and in a receipt dated 16th January, 2018 the fine imposed of Kshs.10,000/- was duly paid. The application is filed pursuant to sections 362, 364 of the Criminal Procedure code and 165 (6) of the constitution as read together with section 389A of the Criminal Procedure Code. The applicant James Wanjema through Mr. Itaya & Co. Advocates applied for the following orders

(a) that the decision of the learned Chief Magistrate Hon. Shitubi forfeiting the three exhibit in Kajiado Criminal case number 75 of 2018 on 16th January, 2018 be reviewed and or set aside.

(b) That the Honourable court do order that the gambling machines be released to the applicant. In support of the application is an affidavit by James Wanjema dated 12th February, 2018. The gist of the applicant disposition are that the accused David Musau was his employee operating gambling machines.

(c) That upon pleading to the charges and sentence passed he was not given an opportunity to be heard as to the forfeiture of the property to the state. Mr. Akula, the Senior Prosecution Counsel objected to the application that the applicant was a stranger. Learned prosecution counsel took issue with the applicant for failure to disclose or produce evidence of any contract of employment with David Musau.

(d) That the gaming machines being sought to be released to the applicant, probative evidence has been tendered to prove ownership.

Jurisdiction of the High Court

The High court supervisory and revisional powers is provided for under Article 165 (6) and 7 of the constitution and section 362 of the criminal procedure code. The exercised jurisdiction vested with the court gives power and authority to call for the record of any proceedings before any subordinate court or persons, body or authority exercising a judicial or a quasi judicial freedom but not over a superior court.

The revisional power under Section 362 of the Criminal Procedure Code are limited to where no appeal lies and the issue involves where the inferior tribunal or subordinate court has failed or acted illegally, irregularly or improperly.

It is also clear under Section 362 of the Criminal Procedure Code the High Court can invoke its powers of revision *suo moto* when exercising its supervisory jurisdiction over subordinate courts or tribunals as mandated under Article 165 (6) and (7) of the constitution.

The applicant in this case did not use the appeal procedure because he was not a party to the criminal case before the magistrate's court. Notwithstanding the provisions of Article 165 (6) and (7) of the constitution and Section 362 of the Civil Procedure Code touching on the application before me the sanctity and integrity of the proceedings can be appraised to ensure the fair administration of justice.

It is trite law that the real purpose of litigation is to address the dispute in issue in order to attain the interest of justice.

For the above reasons I would not confine myself to the notice of motion seeking a review of forfeiture orders but also peruse and consider the legality, justness, propriety and correctness of the totality of the proceedings.

The first issue for determination is whether the sentence order of a fine of Kshs10,000 in default three months imprisonment was within the scope of the provisions of the law. In the proceedings before the chief magistrate David Musau was indicted with the offence of gambling in a public place contrary to Section 55 (1) of the Betting and Gambling Act Cap. 131 of the laws of Kenya.

When the elements of the charge were read to David Musau he pleaded guilty and the trial Magistrate convicted him on his own plea of guilty. The facts implicating him with the offence were presented by the prosecution counsel which he readily admitted to justify a watertight conviction.

Regarding sentence the learned trial magistrate imposed a fine of Kshs. 10,000/- in default three months imprisonment.

Under section 55 (1) of the Act which creates the offence and penalty does state as follows:

“Subject to this Act, 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 (3000) or to imprisonment for a term not exceeding three months or both”.

What therefore is pertinent at this stage is to consider whether the misdirection under section 55 (1) by the session trial magistrate affords sufficient grounds to interfere with the verdict on sentence? The test to apply as provided for under section 382 of the Civil Procedure Code is whether the error, or omission occasioned a failure of justice.

In the present case the verdict of guilty for the offence of gambling in a public place attracts a maximum penalty of a fine of three thousand in default three months imprisonment or both. The sentence meted out against the accused of Kshs. Ten thousand (10,000) fine was way far beyond the three thousand provided for in the Act.

There is no dispute that the sentence passed does not exist in law and for all intents and purposes under the applicable statute I consider it excessive for the offence under section 55 (1) of the Act. The requirement that the accused be justly and fairly tried by the independent tribunal or court in view of the wrong sentence was in total disregard of the law and did occasion miscarriage of justice.

The limitations on sentence are sanctioned by law. The scope of such limitations are very clear under section 55(1) of the Act. The sentence awarded is therefore erroneous and illegal pursuant to the provisions of section 55(1), and as a consequence not tenable in law. I am alive with the provisions of section 382 of the Criminal Procedure Code on the principles.

“that no finding on sentence shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, order or judgment.....unless the error, omission or irregularity has occasioned a failure of justice.”

Applying the above provisions the decision on sentence reached by the learned trial magistrate was not prescribed for the offence under section 55(1) of the Act. The resultant effect was a sentence which was punitive and in excess of the limitation of the law. As a consequence it occasioned a failure of justice.

In the premises the illegal sentence of Kshs.10,000 fine is hereby quashed and in its place a correct sentence of a fine of Kshs.3000 is substituted in default three months imprisonment.

That takes us to the legal question whether the court can order for forfeiture without complying with section 67 of the Act. This 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”

Under this provision forfeiture is not mandatory, the court must determine whether the property is subject to forfeiture before such an order is issued.

I have perused the Betting, Lotteries and Gambling Act the procedure of executing section 67 on forfeiture is not clearly stated. I presume therefore the court ought to be guided by the provisions of section 389A of the Criminal Procedure Code. If the state seeks forfeiture of specific property subject matter of the criminal proceedings it has to establish that the requisite nexus between the property and the offence. The forfeiture phrase of the trial under section 389A of the Code has the following elements:

(a) A notice shall be served on the person believed to be the owner of the property or chattel that it will be at a specified time and place that the said goods shall be forfeited unless good cause is shown to the contrary

(b) 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.

(c) If the court finds that the goods or things belong to same person who was innocent of an offence in connection with which they may or are not to be forfeited and who neither knew or had reason to believe that the goods were being used in connection with the offence and did exercise due diligence to prove it being used the court shall not order the forfeiture.

It may be argued that the forfeiture of the gaming machines itself by the court may be characterized as a remedial measure to remove the dangerous or illegal items from society when exercising discretion on law enforcement measures.

The court should not lose sight of the provisions under section 67 of the Act and Section 389A of the Code.

Section 389A of the Criminal Procedure code requires notice to be served upon the claimant of the seized property. This notice need not describe the property subject in detail rather it requires only the charge to contain the notice to the owner that the state will seek forfeiture of the property as part of any sentence in accordance with the law.

Section 67 of the Betting, Lotteries and gaming Act vest the power in the court to deal with anything produced before it under this Act, save that it must be 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 procedures to enforce section 67 of the Act as prescribed can be found in Section 389A of the Criminal Procedure Code.

These are the rights to private property which emphasizes that the state can only seize the individual rights to private property only through the same process of the law. The constitution safeguards against the arbitrarily deprivation of property right under the guise of enforcing criminal law should be dealt with restraint. This implies that criminal forfeiture is not an automatic penalty available to the state upon a conviction of the offender Section 389A encompasses a process in which the prosecutor in the criminal case applies to the court to conduct forfeiture inquiry.

In the instant case the notice requirement for putting the accused on notice that the seized property subject matter of the charge will be forfeited was not served or issued before the final orders.

The application before me involves third party interest in the forfeited property. He was not a party to the criminal proceedings, common sense dictates that he has to wait the completion of the criminal trial against an accused person before he can petition the court on the issue of forfeiture.

In my view the application to adjudicate the right to the forfeited property could have been entertained by the trial court pursuant to the provisions of section 67 of the Act as read together with section 389A Criminal Procedure Code. My interpretation of section 389A of the Criminal Procedure Code and the catchwords under section 67 of the Act referred to – **to the satisfaction of the court** is to place the burden on the claimant to prove his or their interest in the subject property.

What the law envisages under section 389A Criminal Procedure Code on the process as to forfeiture involving third parties or the offender is to demonstrate by way of evidence that:

(a) They have a legal right, title or interest in the property and such a right is protected under the constitution or statute law of the country. That any order on forfeiture is invalid in whole or part because the right of ownership is vested in the third party other than the offender.

(b) The petitioner or applicant is a bona fide purchaser for value of the right to title or interest in the property and was at the time of purchase reasonably within court to believe that the property was to be a subject of criminal forfeiture under section 67 of the Betting, Lotteries and Gaming Act.

From the record of the trial court the forfeiture phase of the trial did not comply with section 67 of the Act and section 389A of the Criminal procedure Code in reaching a conclusion to order the gaming machine to be forfeited to the state. There was no inquiry or ancillary hearing to determine the interest in the property before forfeiture. Regardless of the orders on forfeiture being made by trial courts, there is need for clarity and uniformity in a manner that ensures due process of the law. One other single most important factor for granting forfeiture orders is to give reasons and the section which have been considered on the issue and the grounds raised by the state in such judicial proceedings.

As a result pursuant to Article 165 (6) and (7) of the constitution as read with section 362 of the Criminal Procedure Code, I find that the proceedings on forfeiture were conducted in an irregular and improper manner occasioning prejudice and a failure of justice on the part of the accused and the applicant in this application.

This court is unable to ascertain the ownership of the property from the scanty documentary evidence produced by the applicant. The alternate remedy is to remit this matter back to the trial court below for a retrial on the issue of forfeiture taking into account section 53 and section 67 of the Betting, Lotteries and Gambling Act. Accordingly the following orders are granted.

1. The fine of Kshs10,000 in default three months is hereby quashed and substituted with a fine of Kshs3000. From the record the accused person had already paid the fine of Kshs.10,000. In view of the above findings the excess of Kshs7000 is hereby ordered be refunded forthwith.

2. The application on forfeiture is also set aside and proceedings be commenced denovo in Criminal Case No 75 of 2018.

It is so ordered.

DATED, DELIVERED and SIGNED on 21st day of March, 2018.

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R. NYAKUNDI

JUDGE

In the presence:

Mr. Itaya for the defence

Mr Akula for the DPP for applicant

Applicant present