REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL REVISION NO 17 OF 2018

PETER IGIRIA NYAMBURA...APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS...............RESPONDENT

RULING

In a trial held before the Chief Magistrate Court on 21st March, 2018 George Osiye was convicted of the offence of removing forest produce contrary to section 64(1) (a) as read with section 64 (2) of the Forest Conservation Management Act 2016. The particulars of the offence are that on 21st March 2018 along Namanga – Nairobi road in Kajiadio central Sub-county he was found transporting 4 bags of charcoal using motor vehicle registration KBL 373N Nissan Serena without a permit from the Director of Kenya Forest Service for the year 2018.

In his own plea of guilty George Osiye was convicted and sentenced to a fine of Kshs 50,000 in default four months imprisonment. In addition the learned trial magistrate forfeited the vehicle to the state. The owner of the vehicle peter Igiria Nyambura was aggrieved of the decision by the trial magistrate to forfeit the vehicle.

In his notice of motion dated 9th April, 2018 pursuant to the provisions under Article 165 (3), (6) (7) Articles 50 section 3, 362, 364 and 389A of the criminal procedure code sought the following relief

> **That the honourable court be pleased to release to the applicant motor vehicle KBL 373N Nissan Serena currently being detained by the Kenya Forest Service as that is in the interest of justice.**

In support of the reasons Peter Igiria Nyambura sets out in his affidavit the basis on which this court should consider and review the order on forfeiture.

Mr. Akula, Senior Prosecution Counsel on behalf of the state submitted and conceded that there was a breach of section 389A of the criminal procedure code in regard to forfeiture proceedings conducted by the learned trial magistrate.

Analysis and resolution

I have considered the notice of motion and submissions by both parties. Before embarking on the analysis and findings it is appropriate to make reference to the law.

The Law

Section 68 (2) of the Forest Conservation and Management Act provides as follows;

> ***"Where a person is convicted of an offence of damaging, infringing or removing forest produce from any forest, the forest produce shall be forfeited to the owner the court may in addition to any other relief order, 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 accurate value of the forest produce or the use of restoring the damage caused to that forest as a result of the offence committed whichever is higher"***

Constitutional provisions

The constitution guarantees the right to a fair trial by an impartial and independent court or tribunal established by law (see Article 50 (1) of

the constitution). In accordance with Article 50 the right to a fair hearing and due process is a fundamental anchor in the administration of justice. Under Article 47(1) every person has a right to a fair administrative action.

It is also provided under Article 31 of the constitution that every person has the right to privacy which includes the right not to have their possession seized. This is also in line with the provisions of Article 40 on the protection of the right to property.

The importance of this is for the trial courts while adjudicating disputes involving right to private property the dictates of the constitution should mirror throughout the proceedings. In particular the decision on forfeiture should adhere to Article 47(1) on fair administrative action.

It is a fundamental notion of justice that the guilty should be punished and the same law protects the innocent and law abiding citizens. It is necessary to avoid prejudice to the administration of justice in particular proceedings on forfeiture.

My interpretation of Section 68(2) of the forest Conservation and Management Act does not automatically allow for forfeiture of vessel, motor vehicle or article used in conveyance of forest produce. This inference can be logically drawn from the heading of Section 68 whose objective is compensation for loss or damage caused to the forest as a result of the offence committed. It is clear that there are other remedial measures to be considered by the court besides forfeiture. The right to forfeit private property must be a subject of both the constitution and the enabling statute. If there is a lacuna on the procedure on forfeiture in the primary Act the court should find recourse in section 389A of our code.

Section 389A provides for forfeiture determination. The elements of the section are that a court must not enter a judgment of forfeiture in a criminal proceedings unless the indictment or information contains notice to the owner of the vessel or vehicle. It is generally acceptable that the state will seek the forfeiture of the property as part of the sentence in accordance with the applicable Act.

What do I see as the key elements in an application by the state seeking forfeiture in a criminal proceedings?

(a) The state must establish the requisite nexus between the property and the offence.

(b) The courts 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.

Criminal forfeiture, which refers to the courts power to confiscate the accused property as part of sentence has become increasingly prevalent form of punishment in forest conservation Act offences.

As a form of punishment the principle of proportionality ought to apply. Proportionality is considered to be so important in criminal sentencing because it accedes with principles of fundamental justice. People have a sense that sentences scaled to the gravity of the offence are fairer than punishments which are not proportionate to the crime. It is a generally acceptable principle in criminal law that punishment must fit the crime. (See ***Andrew von Hirsch C proportionality in the philosophy of punishment 1992 16 Crime and justice 55,56)***

Furthermore in view of the judicial sentencing policy guidelines proportionality principle has been qualified as playing significant role in punishment and sentence in our jurisdiction.

In my practice of over 30 years in our justice system I have come across challenges faced by trial courts in balancing the competing interest between the gravity of the offence and the rights of an accused person. This has been more demonstrated when it comes to forfeiture proceedings. In other jurisdictions like South Africa attempts have been made for a comprehensive legislative framework on forfeiture. When faced with a similar situation like the present scenario the court in the case of ***National Director of Public Prosecutions v Mohamed 2002 SA 843*** the court held as follows:-

> "***There is however, a defense at the second stage of the proceedings when forfeiture is being sought by the state. An owner can at that stage claim that he or she obtained the property legally and for value, and that he or she neither knew or had reasonable grounds suspect that the property constituted the proceeds of crime or had been an instrumentality in an offence***"

In our jurisdiction there is no comprehensive legislative scheme on the law of forfeiture. Each statute has specific provisions in respect to this matters. That opportunity to me is availed and recognized under Section 389A of the Criminal Procedure code where the primary statute is silent. Therefore the grant or denial of forfeiture petition by the state rests within the discretion of the trial court.

In my view it has to be determined and supported by substantial evidence to establish the ownership of the property by creating a nexus to the charge.

At the outsets this court notes that the forest conservation and management Act 2016 provides for various offences. Removing any forest produce perse and mere possession is unlawful. The derivative contraband is property innocence by itself. An example of derivative contraband is the motor vehicle in question used to transport the illicit forest produce.

In the instant case the learned trial magistrate relied on the forest conservation and management Act which specifically authorizes forfeiture. I do not think that Section 389A of the Criminal Procedure Code is inapplicable in the circumstances of the case before the trial court. Reflecting on the concerns raised by the applicant, my take is that a presumptive innocent person whose property is a subject of criminal proceedings should not lose the property without an opportunity to be heard.

The National Police Service and other similar agencies have a right to seize property associated with certain crimes. As the agency takes possession one would expect administrative action be taken to establish ownership. If the appropriate agency has probable cause to apply to the court for forfeiture, the law requires notice to be served to the owner.

The trial court must hold an inquiry where the prosecution must satisfy and demonstrate that the chattel, vessel or motor vehicle ought to be forfeited to the state. It is at that stage the owner is allowed an opportunity to raise a defence to the forfeiture. This procedure in most cases is overlooked by trial magistrates and the consequence of it has been to burden the High Court with review applications.

Decision

Applying the above principles I am satisfied that the owner of the motor vehicle registration no. KBL 373 was not served nor was he aware that his vehicle had been seized by the police for the alleged offence. The failure to serve notice both under Section 68 of the Act and Section 389A of the Criminal Procedure Code occasioned prejudice and a failure of justice against the applicant. Secondly, the order on forfeiture is disproportionate to the nature and gravity of the offence in which the offender was fined Kshs,50,000.

I consider the penalty of Kshs. 50,000 adequate for the offence of being in possession of four bags of charcoal. That from the record there was no evidence that the person found guilty of the offence was employed or an associate or in enterprise participation with the applicant. In the premises the order on forfeiture is hereby quashed and the subject motor vehicle KBL 373N is accordingly restored back to the applicant.

DATED, DELIVERED, SIGNED on 20th day of April, 2018.

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R. NYAKUNDI

JUDGE

In the presence:

Mr. Akula for the DPP

The Applicant present in person