



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

MISC. APPL. NO. 117 OF 2018

BETWEEN

CORNELIOUS CHEGE.....APPLICANT

AND

REPUBLIC.....RESPONDENT

(An application for revision of an order of Hon. R. M. Oanda, PM dated on 5th December 2018 in Criminal Case No. 872 of 2018 at Principal Magistrates Court at Kilgoris)

RULING

1. The accused in the case before the trial court, CORNELIOUS CHEGE was charged and convicted on one count of Transporting Forest Produce without a movement permit contrary to **Rule 14(1)(a)** as read with **Rule 20** of the **Forest (Charcoal) Rules, 2009** and **Section 68(1)(c)** of the **Forest Conservation and Management Act, 2016**. After conviction on his own plea of guilty, he was fined Kshs. 20,000/- and in default 90 days in imprisonment. The court ordered that the motor vehicle used be forfeited to the state.

2. The application for revision concerns the order of forfeiture of the motor vehicle. According to the deposition of Winnie Maureen Mireri, the vehicle according to the records belongs to **AHMED ABDIRAHMAN IBRAHIM** and **FIRST COMMUNITY BANK LIMITED** and not the accused.

3. Ordinarily in criminal proceedings, anything or goods used in the commission of the offence will be forfeited to the State upon conviction of the accused unless a third party lays claim to it. The procedure on forfeiture of goods is set out in **section 389A** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** which provides as follows;

389A(1) 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.

(2) If the court finds that the goods or things belong to some person who was innocent of the offence in connexion with which they may or are to be forfeited and who neither knew nor had reason to believe that the goods or things were being or were to be used in connexion with that offence and exercised all reasonable diligence to prevent their being so used, it shall not order their forfeiture; and where it finds that such a person was partly interested in the goods and things it may order that they be forfeited and sold and that such person shall be paid a fair proportion of the proceeds of sale.

4. Without any other evidence and in light of the guilty plea, the trial magistrate was correct to assume that the vehicle belonged to the accused and since the vehicle was used as an instrument to commit the offence it was properly forfeited. However, it is now apparent the vehicle belongs to a third party. It is now the duty of the court to inquire into the ownership of the vehicle and whether it was used to commit the offence. The trial court shall therefore call upon the owner to show cause why the vehicle should not be forfeited in terms of **section 389A(2)** of the **Criminal Procedure Code**.

5. In accordance with **section 363(2)** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* and in light of what I have stated above, I make the following orders;

(a) The forfeiture order of order in respect of motor vehicle registration number **KBR 951Y** be and is hereby set aside.

(b) The subordinate court shall deal with the motor vehicle in accordance with the provisions of **section 389A** of the *Criminal Procedure Code* to determine the owner of the motor vehicle and whether it was used in commission of the offence.

(c) In the meantime, the motor vehicle **KBR 951Y** shall remain in police custody subject to the orders that the trial court may make.

DATED and **DELIVERED** at **KISII** this **18th** day of **December 2018**.

D. S. MAJANJA

JUDGE