



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 244 OF 2013

WILLIAM GICHURE MWANGI.....APPELLANT

VERSUS

REPUBLIC.....STATE

*(Appeal from the Ruling of the Chief Magistrate's Court at Narok*

*Hon. Temba A Sitati –Ag. Senior Resident Magistrate delivered*

*on the 20<sup>th</sup> September,, 2013 in CMCR Case No. 1670 of 2012)*

**RULING**

By this application the applicant one **WILLIAM GICHURE MWANGI** prays to the court for release of his motor vehicle Reg. No. KBD 166D.

The background of the matter is that in **Narok CMCC No. 1076/2012 REPUBLIC Vs DUNCAN GICHUKI KIMANI and DANIEL NJOROGI MUIRURI** the 1<sup>st</sup> accused who was a driver employed by the applicant was convicted of offences under the **Wildlife (Conservation and Management) Act Cap 376 Laws of Kenya**. The trial court proceeded to confiscate and forfeit the eight (8) elephant tusks recovered from the accused persons. Similarly the motor vehicle Reg. No KBD 166D Toyota Station Wagon in which the contraband was being transported was also forfeited. The applicant who was not an accused person in that case and who claims to be the owner of the vehicle had applied in the lower court to have the vehicle released back to him. The trial magistrate in his ruling dated **20/9/2013** declined to release the vehicle to the applicant. The applicant has now appealed against that ruling.

**MS OUNDO** acting for the DPP opposed any release of the vehicle. Counsel for the applicant submitted that no forfeiture proceedings were conducted in the lower court before the vehicle was forfeited. This is factually incorrect. The record clearly shows that a Notice of Motion application dated 4/1/2013 seeking release of the motor vehicle Reg. No. KBD 166D was heard by the trial court in which a **MR. MOGERE** Advocate argued the motion on behalf of the applicant. It was that application which culminated in the lower court ruling of 20/9/2013.

Counsel cites Article 40 of the Constitution which guarantees to all citizens the right to own private property. However, that right like all other rights is not absolute. It is limited by the same Constitution. Where the property is utilized to breach the law or to deny other citizens their rights then that right to own property cannot be upheld.

This is a case in which the vehicle in question was used to transport eight (8) elephant tusks in contravention of the law. Section 52(1) of the Wildlife (Conservation and Management) Act Cap 376, Laws of Kenya (now repealed) provided

***“where a person in convicted of a forfeiture offence, the court shall unless it considers for reasons to be recorded by the court, that in all the circumstances of the case it would be unjust to do so, order that any animal trophy, weapon, net, vehicle, instrument material or thing whatsoever whether similar to those enumerated or not in relation to, in connection with or by means of which the offence has been committed, shall be forfeited to the Government”*** (own emphasis)

The applicant has conceded that the 1<sup>st</sup> accused **‘Duncan was his driver**, to whom he had given authority to drive and use his vehicle for transport business. The applicant however pleads that he had no idea that his driver was using the vehicle for the illegal act of ferrying wildlife trophies.

Once the applicant handed over his vehicle to his driver then for all intents and purposes that driver becomes the agent of the applicant in the use of said vehicle. The employer is therefore vicariously liable for all the acts of his driver in the use of that vehicle. That vehicle was used to facilitate the commission of a crime. Poaching is a serious offence and it is facilitated by persons who avail their vehicles to ferry the fruits of poaching. Eight (8) elephant tusks result in the death or killing of at least four (4) elephants. The court cannot overlook the great blow this has to conservation efforts in this country.

The applicant has not advanced any justification as to why his vehicle should be exempted from forfeiture. Article 40(2) of the Constitution prohibits any **‘arbitratry’** deprivation by the State of a citizen’s right to own private property. There has been no arbitrary act by the state here. The vehicle was used in furtherance of a crime thus it is liable for forfeiture. I am further guided by Section 51(2) of the relevant Act (at the time) which by use of the word **‘shall’** made such forfeiture mandatory.

I have considered the decision in the case cited by counsel **PETERSON NJUE NJERU & ANOTHER Vs HON. A. G [2010]eKLR** I find the same to be distinguishable from the present case in that the latter was a Judicial Review matter in which it was held that the applicant was not afforded a hearing before his vehicle was forfeited. In this case the trial court did accord the applicant a hearing before coming to its decision.

Based on the forgoing I decline to allow this appeal against the decision (ruling) of the trial court to forfeit the motor vehicle Reg No. KBD 166D. I decline to order release of the vehicle to the applicant. The same shall remain forfeited to the Kenya Wildlife Service.

Dated in Nakuru this 27<sup>th</sup> day of January, 2017.

**Maureen A. Odero**

**Judge**