



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CRIMINAL APPEAL NO. 68 OF 2016**

**GLADYS WAMBUI MICHUKI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

1. The Applicant approached this Court by way of Notice of Motion seeking an order that pending hearing and determination of the Appeal filed herein, the orders of the Subordinate Court dated **18<sup>th</sup> October, 2016** directing that the motor-vehicle Registration Number **KCG 258V Hino Truck** be forfeited to the Kenya Forestry Service be suspended and the said motor-vehicle be released to the Applicant; or in the alternative and without recourse to the hearing of the instant Appeal, the Court do review and quash the forfeiture orders of motor-vehicle Registration Number **KCG 258V** made by the Chief Magistrate Kitui on **18<sup>th</sup> October, 2016**; and the Appeal be heard on priority.

2. The application is supported by an affidavit deposed by the Applicant who deposes that she is the owner of the motor-vehicle Registration Number **KCG 258V a Hino Truck** which is financed by **Faulu Microfinance Bank Limited** whose loan is still outstanding. That she released the motor-vehicle to her son **Louis Gichuhi Muchoki**, his official driver to deliver vegetables in Kitui on **14<sup>th</sup> September, 2016**, he informed her that he had been arrested and when she went to Kitui she found him having been charged in Court with the offence of **Transporting Forest Produce Without a Forest Movement Permit** contrary to **Section 52(1)(a)** as read with **Sub-Section 2** of the **Forest Act No. 7 of 2005**. She established that indeed the lorry was transporting charcoal bags purchased from brokers at Kabati Market in Kitui. She did not authorize the motor-vehicle to carry charcoal. His son whose name was erroneously spelt as **Luice Musyoka Munyoki** pleaded guilty and was fined **Kshs. 50,000/=** which she paid. She was granted an opportunity to show cause why the motor-vehicle could not be forfeited to the State. She discussed the issue with the police and the Directorate of Public Prosecutions who informed her that they would not object to her application being allowed. She was shocked when the Magistrate ordered forfeiture of the lorry to the Kenya Forest Service (Service) a ruling that she has appealed. Her financiers promised to apply to the High Court for an order quashing the order of the Lower Court but they have not acted.

3. The Respondent through **No. 49320 Sergeant Charles Wahome** filed a Replying Affidavit in response to the application. He deposed that the letter relied upon by the Applicant as proof of ownership was not an ownership document. That the Applicant failed to demonstrate that the motor-vehicle was delivering cabbages. The motor-vehicle was detained for transporting charcoal without a permit.

4. That the Court exercised the discretion to detain the motor-vehicle pursuant to the provisions of **Section 55** of the **Forest Act No. 7 of 2005**. That a Judicial Review Case has been filed, **HCJR 11/2016** pending before Court regarding the same motor-vehicle and there is no proof that the Appellant was not aware of the business being carried out by her son.

5. The application was canvassed by way of written submissions. **Mr. Mwalimu** Counsel for the Applicant submitted that the Applicant did not know that her son was engaging in the illegal business of carrying charcoal without a permit, a crime he was punished for. Citing the **Nakuru High Court Judicial Review Case No. 53 of 2012** where it was observed that:

***“Forfeiture is a penalty. However, it can only be treated as a penalty where the evidence clearly shows that the property forfeited belongs to the Accused.”***

He stated that the Court ought to address itself to the issue of the motor-vehicle ownership. Further he argued that the vehicle belonged to the Applicant and **Faulu Microfinance Bank Limited** who were not heard. He concluded by calling upon the Court to exercise its review powers by quashing the decision of the Lower Court in so far as having directed the motor-vehicle to be forfeited.

6. This is a matter where the Lower Court made an order pursuant to the provisions of **Section 55(1)(c)** of the **Forest Act** forfeiting motor-vehicle Registration Number **KCG 258V Hino Truck** to the Kenya Forest Service.

7. A consideration of proceedings attached to the application reveal that **Luice Musyoka Munyoki** was convicted and sentenced in **Criminal Case No. 904 of 2016** on the **22<sup>nd</sup> September, 2016** on his own plea of guilty. The Court caused the motor-vehicle to be detained at **Kitui Police Station** pending hearing of an explanation why the motor-vehicle could not be forfeited to the Service. When the matter came on the **18<sup>th</sup> October, 2016** there was no appearance of either the Accused or any other person. Therefore the Court used the discretion bestowed upon it to forfeit the motor-vehicle to the Service. It alluded to **Misc. Application No. 112 of 2016**. The Ruling delivered on the **18<sup>th</sup> October, 2016** was done after consideration of the application made by the Applicant herein which is the subject of the Appeal.

8. I have considered the authority cited – **Nakuru High Court Judicial Review No. 53 of 2012 Exparte Joseph Muli Nzambe & Another** – it was clearly stated that forfeiture can only be treated as a penalty where evidence clearly shows that the property belonged to the Accused. This would depend on the interpretation of what was envisaged by the Statute and this can only be determined after hearing the Appeal on merit.

9. In the result, I see no good reason to order the release of the motor-vehicle to the Appellant. However, I allow **Prayer 4** of the Application by ordering that the Appeal be heard on priority basis.

10. It is so ordered.

**Dated, Signed and Delivered at Kitui this 26<sup>th</sup> day of July, 2017.**

**L. N. MUTENDE**

**JUDGE**