



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

MISC. CASE. NO. 58 OF 2015

ADAN SAMOW EYMOI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

Through a Notice of Motion dated 11th December 2015 filed by C. K. Nzili & Co. Advocates for Adan Samow Eymoi brought under Article 40 (3) of the Constitution of Kenya and Section 49 (a) of the Criminal Procedure Code, the applicant has sought the following orders:-

- a. That the application be certified urgent and heard exparte in the first instance.
- b. That there be a stay of forfeiture order of motor vehicle registration No. KCC 143F Mitsubishi Fuso Lorry being held at Garissa Police Station pending hearing and determination of the miscellaneous revision.
- c. That the court be pleased to grant any other order in favour of the applicant.
- d. That the costs of this application be in the cause.

The application has grounds on the face of the Notice of Motion. It was filed with a short supporting affidavit containing seven (7) Paragraphs.

When the matter was initially placed before this court, the court granted prayer 1, and ordered that the application be served on the office of the DPP Garissa for interpartes hearing. The application was thus heard on 17th December 2015 interpartes.

With regard to its contents, I wish at this point to observe that the application did not disclose the original criminal case number in the proceedings in the magistrate's court. It also did not disclose the names of the accused persons therein. It further did not disclose the date on which the orders sought to be reviewed were made. It further did not disclose the offence or offences charged and whether the case went for full hearing or whether pleas of guilty were entered. In my view, it would have been preferable for the applicant to have disclosed the above particulars both to this court and to the DPP's office, for easier identification of the subject file and also, for the expeditious conduct of proceedings especially where, this court is requested to exercise its discretionary powers in revision. All important facts have to be disclosed to enable a court exercise its discretionary powers in revision.

Be that as it may, the application was served and it later came out that the subject original case was **Garissa Chief Magistrates' Criminal Case No. 1207 of 2015** wherein Ibrahim Hassan Mohamed, Hassan Mohamed Ibrahim and Edin Kulow Issack were charged jointly with conveying uncustomed goods contrary to section 185 (1) (d) (iii) of the Customs and Excise Act Cap 472 and fined Kshs. 200,000/=, and in default to serve 1 year imprisonment, on their own pleas of guilty. The court also ordered forfeiture

of the goods and the motor vehicle on which the goods were found.

The applicant Adan Samow Eymoi is the owner of the said motor vehicle, registration No. KCC 143F Mitsubishi Fuso lorry, and was not an accused person in the case, and has thus come to this court seeking revision, from the orders of the magistrate's court forfeiting and condemning the motor vehicle.

On the hearing date Mr. Nzili appeared for the applicant. Counsel informed the court that the applicant was present in court.

Counsel submitted that the applicant was seeking the exercise of this court's revision power under Section 362 and 364 of the Criminal Procedure Code. According to counsel, the facts were not disputed, and that the applicant was not one of the persons charged in the criminal case. However without hearing him, the court ordered forfeiture of the motor vehicle under section 203 (2) of the Customs and Excise Act and ordered that the said vehicle be escorted to Kenya Revenue Authority office Garissa. Counsel emphasized that his client was condemned unheard as he was not given an opportunity to show cause why the motor vehicle should not be forfeited. According to counsel the legality of the courts order was thus in question as it did not comply with the requirements of Section 389 (a) of the Criminal Procedure Code, as the learned magistrate erroneously purported to apply the provisions of the Customs and Excise Act against his client who was not an accused person.

Counsel submitted further that condemning the owner of the vehicle without giving him a chance to be heard was against the provisions of the Constitution which conferred a right to fair hearing under Article 10, 47 and 159 of the Constitution. Counsel thus urged this court to exercise its powers under its revision jurisdiction.

Counsel relied on a number of case authorities that is **Republic Vs. Margaret Waweru - Machakos High Court Criminal Revision No. 7 of 2014 (eKLR)**, **Republic Vs. Fredrick Diwani Kazungu & others Malindi High Court Criminal Revision 42 of 2009 [2009] eKLR**, and **Bishar Mohamed Vs. Republic Machakos High Court Criminal Appeal No. 135 of 2014**. In addition counsel relied on the case of **John Sindikha Vs. Republic Bungoma High Court Criminal Revision No. 727 of 2003 [2003] eKLR** and also case of **Republic Vs. Hassan Mshana Machakos High Court Criminal Revision No. 8 of 2014 [2014] eKLR**.

Learned Assistant Director of Public Prosecutions Mr. Wanyonyi submitted that the trial court erred in ordering forfeiture of the lorry without regard to the provisions of Section 389 of the Criminal Procedure Code. In counsel's view, the learned magistrate misinterpreted and wrongly applied provisions of 197 of the Customs and Excise Act, while the applicable law was section 389 of the Criminal Procedure Code, which was applicable even where other provisions of the law existed. Counsel submitted further that it was mandatory for the court to have issued a notice to the owner of the lorry to show cause, before forfeiture by the court. In the present case, the trial court did not issue a notice to show cause, which was an error.

Counsel emphasized that, the right to be heard was protected by Article 47 of the Constitution. All other laws had to be aligned to the Constitutional provision. Counsel relied on the case of **Roy Hauliers Ltd Vs. Attorney General & others – Nairobi Petition No. 607 of 2013 [2014]eKLR** on violation of fundamental rights and also the case of **Peter Nakitare Vs. Republic** on the application of the principles of natural justice. Counsel lastly relied on the case of **Republic Vs. Hon. V. J. Yator & others Mombasa High Court Misc. Application No. 35 of 2014 –[2015] eKLR**.

Counsel concluded by stating, that the State did not support the order of forfeiture of private property which was protected by the Constitution. According to counsel, since the applicant was not charged in court, the only way for him to be heard was through issuance of a notice to show cause by the court which was erroneously not done.

After hearing the arguments of the parties, the court reserved its ruling, and granted stay of execution of the learned magistrates' orders till delivery of the ruling. This order of stay disposed of prayer (b) of the

application, leaving for determination prayer c and d.

The remaining prayer (c) was not specific. It asked that the court be pleased to grant any other order in favour of the applicants. The applicant did not state specifically what order the court should grant. In my view, such was an omission on part of counsel. In my view, the prayers in an application, especially where an applicant is seeking discretionary orders, should be clear and specific.

I have perused the record of proceedings in the trial court. On the 9th of December 2015, the matter came before the Chief Magistrate at Garissa and, in the absence of the three accused persons, the Assistant Deputy Director of Public Prosecutions Mr. Wanyonyi, informed the court that the accused wanted to change their plea and that asked for a production order to be issued for them to attend court the next day 10th December 2015.

On the 10th December 2015, the three accused attended court when the charge was read over and explained to them, and each said it was true. The prosecutor then summarized the facts and then requested the court to go and view the goods outside the court room. At that point, Mr. Wanyonyi who was present informed the court that he had seen the motor vehicle carrying the goods and that it would take long to offload the goods for the court to view the same. He thus asked that further proceedings be conducted on 11th December 2015.

On the 11th December 2015, the court proceeded to Garissa Police Station to view the goods and Mr. Wanyonyi explained to the court that the items (in the lorry) comprised 348 bags of beans of 50kgs each. He also explained that the same were arranged in rows and columns in the lorry. He also informed the court that there were in the same lorry 148 packets of biscuits also arranged in rows and columns, which he produced as Exhibit 2.

All this was done in the presence of the three accused persons, but in the absence of the owner of the lorry, the applicant herein.

Each of the three accused persons then stated that the facts were correct, and was convicted on his own plea of guilty. Mr. Wanyonyi then asked the court to treat each of the accused persons as s first offender. Each was then allowed to say something in mitigation and the court thereafter moved to the court room for sentence.

After considering the facts given by the prosecution and the mitigation of the accused persons, the court stated as follows:- ***“therefore the act of paying part of duty after commencement of this proceedings doesn’t exempt the accused persons from being sentenced. Each of the accused persons is hereby sentenced to a fine of Kshs. 200,000/= in default 1 year imprisonment. Right of Appeal within one year explained.”***

The court went further to make orders with respect to forfeiture and concluded as follows ***“under section 96 (c) of the Customs and Excise Act the goods herein as uncustomed goods are liable to forfeiture. The motor vehicle found transporting the said goods is liable to forfeiture under section 197 (a) of the Act. I consequently order that the goods P. Exhibit 1 and 2 are hereby forfeited and condemned under section 201 (1) of the Act.***

Under section 203 (1) (a), I order that the goods i.e. P.Exhibit 1 and 2 be destroyed within 14 days of today’s date in the presence of the following persons.

- ***Commissioner in charge of KRA office Garissa,***
- ***a representative of Nema***
- ***the executive officer of the Hon. Court***
- ***a representative of office of DPP***
- ***The County Commander. The court further orders that the exhibits shall remain in Garissa Police Station under security of County Commander until the date of destruction. The court orders that the motor vehicle be forfeited and is hereby condemned under section 203 (2a) of***

the Act. The motor vehicle be hereby escorted to the office of the Commissioner of KRA Garissa Office to be subjected to forfeiture process.”

From the contents of the application for revision herein, the plea of the accused persons is not doubted. The sentence imposed on the accused persons has also not been questioned. The forfeiture of the uncustomed goods is also not questioned on revision. What has been questioned by the applicant is the order by the trial court for forfeiture of the subject motor vehicle and its condemnation.

This court has revision jurisdiction from proceedings and orders of magistrates courts under section 362 of the Criminal Procedure Code Cap. 75 of the Laws of Kenya, which provides as follows:-

362 “a High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court”.

The powers which the High Court may exercise under its revision jurisdiction are listed under section 364 of the Criminal Procedure Code, which states as follows:-

“364 (1) in the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the high court may –

- a. ***In the case of a conviction, exercise any of the powers conferred on it as a Court of Appeal by section 354, 357 and 358, and may enhance the sentence;***
 - b. ***In the case of any other order other than an order of acquittal alter or revise the order.***
2. ***No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.***

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

3. ***where the sentence dealt with under this section has been passed by a subordinate court the High Court shall not inflict a greater punishment for the offence which in the opinion of the high court the accused has committed than might have been inflicted by the court which imposed the sentence.***
4. ***Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.***
5. ***When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way or revision shall be entertained at the instance of the party who could have appealed”.***

The consequential action to be taken by the High Court under its revision jurisdiction in criminal matters, is provided for under section 367 of the Criminal Procedure Code, which states as follows:-

367 When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as a confirmable to the decision so certified, and if necessary the record shall be amended in accordance therewith.

In my understanding the complaint raised in these revision proceedings only relates to the orders of the Chief Magistrate on forfeiture and condemnation of the motor vehicle or lorry which was carrying uncustomed goods. I have perused the record. The applicant herein not having been an accused nor participated in the criminal proceedings is correct to approach this court through its revision jurisdiction, as he has no right of appeal.

Regarding to the forfeiture and condemnation of the subject lorry the learned trial magistrate relied on the provisions of Section 197 (1) and 203 (2) of the Customs and Excise Act

Section 197 provides that a vessel less than 250tons register, and a vehicle, an animal or other thing made use of in the importation, landing, removal, conveyance, carriage or exportation of goods liable to forfeiture under the Act shall itself be liable to forfeiture.

Section 203 (2) of the Act relates to condemnation of goods liable to forfeiture. Indeed the motor vehicle was found transporting, carrying or conveying the uncustomed goods. However it must be noted that the applicant was not an accused person in the proceedings before the trial magistrate, but nevertheless was the owner of the motor vehicle.

Counsel on both sides agree that section 389 A of the Criminal Procedure Code (Cap. 75) should have been invoked. I was referred to several court cases. The Criminal Procedure Code under section 389 A has clear and elaborate provisions on forfeiture of goods. The said section provides as follows:-

389 A (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 place and time, order the goods or things to be forfeited unless a 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 with 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 finds fit.

(2) if the court finds that the goods or things belong to some person who was innocent of the offence in connection 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 connection with that offence and exercised all reasonable diligent to prevent them from being so used it shall not order for their forfeiture; and where it defines 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.”

In effect the applicant should have been summoned by the court to show cause before forfeiture.

In addition the learned Assistance Director of Public Prosecutions does not oppose the request for revision. He emphasized that under article 47 of the Constitution the right to be heard is a fundamental right. In any event such right was inherent in court proceedings so that persons are not condemned unheard which would be contrary to the principles of natural justice. I agree that even under our replaced Constitution the right to be heard was sacred. In our present Constitution, it is not just sacred but there is a Constitutional requirement even for fair administrative action under Article 47. The Bill of Rights has also been enlarged and clearly amplified and all courts are commanded to enforce the same. Article 40 clearly protects every person's rights to property. The lorry herein, it is admitted, belonged to the applicant who was not an accused person.

The case of **Republic Vs. Hon. V. J. Yator & others** was a Judicial Review matter and is distinguishable from the present case. The present matter has been brought under this court's revision jurisdiction. In my view the cases of **Republic Vs. Margaret Waweru Machakos High Court Criminal Revision No. 7 of 2014**, and the case of **Republic Vs. Hassan Shaban Mshama Machakos High Court Criminal Revision Bo. 8 of 2014** are relevant herein. In the case of **Republic Vs. Hassan Mshama** a notice to show cause was properly issued on the owner of the motor vehicle before forfeiture, which was the right procedure. Though the vehicle was thereafter forfeited, the High Court in revision set aside those orders.

I am persuaded that in the present case this court should set aside the forfeiture and condemnation orders on the vehicle, as they were issued without the owner of the lorry being availed an opportunity to show

cause, while infact the lorry was not part of the uncustomed goods on which the charge was based.

I thus allow the application for revision, and set aside the forfeiture and condemnation orders, and order that the motor vehicle registration KCC 143F Mitsubishi Fuso lorry be released to the applicant.

Dated and delivered at Garissa this 19th day of January, 2016

GEORGE DULU

JUDGE