



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
JUDICIAL REVIEW NO. 53 OF 2012

IN THE MATTER OF FOREST ACT, 2005

AND

IN THE MATTER OF PRINCIPAL MAGISTRATE'S COURT CRIMINAL CASE

NO. 625 OF 2012

REPUBLIC VERSUS JOSEPH MULI NZAMBI & ANOTHER

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL MAGISTRATE AT ELDAMA RAVINE.....1ST RESPONDENT

THE KENYA FOREST SERVICE.....2ND RESPONDENT

THE OFFICER INCHARGE OF

GATARAKWA POLICE STATION.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

RULING

This Ruling relates to a Notice of Motion dated 24th August, 2012, and filed on 29th August 2012 pursuant to leave of court granted on 17th August, 2012 to institute Judicial Review proceedings pursuant to Order 53 rule 3 of the Civil Procedure Rules, 2010 -

- 1. that an order of certiorari do issue quashing the decision of the Hon. Principal Magistrate at Eldama Ravine in Criminal Case No. 625 of 2012 forfeiting to the State, the ex parte company, Applicants' motor vehicle registration number KBQ 279, U ZC 3547, Mercedes Benz, Prime Mover Lorry that the costs of this Application, and the costs of the Application for leave to institute these proceedings and other costs incidental thereto be provided for."*
2. The Application was premised upon the Statement of Facts, Affidavit Verifying the Facts of

one Leonard Kilenge Kioko sworn on 17th August, 2012 attached to the Chamber Summons of 16th August, 2012 and the grounds on the face thereof.

3. The facts are not in dispute. The ex parte applicant is a limited liability company engaged in haulage business. It is, together with its financier Diamond Trust Bank Ltd, the registered owner of a motor vehicle registration Number 279U along with a Trailer registration Number ZC 3457, Mercedes Benz Prime Mover Lorry. On the material day the said motor vehicle was in the charge of one Joseph Muli Nzambi the driver thereof who had been tasked by the company to deliver a consignment of wheat from the port of Mombasa to Unga Ltd in Eldoret, in Western Kenya.

4. On his return journey, the driver, the said Joseph Muli Nzambi decided to collect a few shillings by assisting his own customer, one Simon Mukundi Kairo to ferry the latter's charcoal which happened to have no permit from the Kenya Forest Service, and was therefore illegal. Charcoal is a product of forests, under the Forest Act, requires any person carrying forest produce to have a permit. The driver and his hirer did not have such licence. They were arrested and were charged in Eldama Ravine PMC Criminal Case No. 625 of 2012. Both the driver and the owner of the charcoal pleaded guilty and were each fined Ksh 50,000/= as by law prescribed, and which fine they immediately paid.

5. In addition to the fine, the trial court also ordered forfeiture of the motor vehicle to the State, in particular, the Kenya Forest Service. It is the latter order which is the subject of these proceedings, and therefore this Ruling. It is the ex parte Applicant's case that, it, not being a party to the criminal trial, it has absolutely no right of appeal from the decision made by the trial court. The ex parte Applicant however contends that it being the owner of the motor vehicle it was entitled to be heard on the question of forfeiture of the motor vehicle and that the trial court failed to address itself on the question of ownership of the motor vehicle.

6. Counsel for the *ex-parte* Applicant relied on the case of **MWASI VS. REPUBLIC [1989] 544**, where Bosire and Githinji JJ held -

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

7. Counsel consequently submitted that in determining the issue of forfeiture of the motor vehicle, the court ought to have given the ex parte Applicant an opportunity to be heard and that in failing to do so, the trial court *acted in excess of jurisdiction and in breach of the rules of natural justice* and consequently the decision of the trial court is subject to judicial review.

8. Counsel relied on the decision of Ouko J (*as he then was*) in the case of **PETERSON NJUE NJERU & RACHEL NJOROGE VS. MARALAL SENIOR RESIDENT MAGISTRATE [2010] eKLR** where the learned judge relying on the Court of Appeal case of **PRIME SART WORKS LTD VS. KENYA INDUSTRIAL PLASTICS LTD [2001] E.A. 528**, observed that -

“... implicit in the concept of fair adjudication lie two cardinal principles namely that no man shall be judge of his own cause and that no man shall be condemned unheard, that these two principles of natural justice must be observed by the courts save where their application is expressly excluded.”

9. In this case as already narrated in the earlier passages of this Ruling, the driver of the motor vehicle had been duly instructed by the owner of the vehicle to deliver a cargo of wheat (*from the port of Mombasa to Eldoret in Western Kenya*). That was an authorised journey. The return trip to Nairobi/Mombasa was certainly also authorized. What was not authorized was the carriage of sacks of charcoal. For that the driver and his hirer suffered a fair fate, as they were heard and pleaded guilty to the charges and were duly punished. The ex parte applicant, was not heard.

10. Forfeiture is a punishment under which the offender loses all his interests in his property. It seems to me therefore, it is necessary for the trial court to establish **firstly**, whether the offender is the

owner of the property being ordered to be forfeited. **Secondly**, the trial court after establishing that the property to be forfeited does not belong to the offender, needs to summon the owner of the property to show cause why his property, used in the commission of the offences should not be forfeited.

11. The questions are in tandem with the principle that forfeiture is a punishment or penalty against the offender, as owner of the property. Where the property does not belong to the offender or the accused, forfeiture of the property would amount to condemning the owner thereof without reference to him. This will be a clear breach of the hallowed canons of natural justice, that no person may be condemned unheard.

12. Whereas the trial magistrate had the jurisdiction under Section 55(1)(c) of the Forest Act 2005 (*No. 7 of 2005*), to order forfeiture of the sacks of charcoal as these apparently belonged to Simon Mukandi Kairo, the Second accused, the learned trial magistrate however exceeded that jurisdiction by ordering the forfeiture of the motor vehicle without first making inquiry of the ownership thereof and affording the owner thereof an opportunity to be heard.

13. For those reasons there shall issue an order of *certiorari* to bring to this court and be quashed the order of the learned trial magistrate in Eldama Ravine PMC Cr. Case No. 625 of 2012, purporting to forfeit the *ex parte* Applicant's motor vehicle registration No. KBQ 279U and Trailer Registration No. ZC 3457.

14. I direct that the said motor vehicle and trailer be released forthwith to the *ex parte* Applicant KYEVALUKI SERVICES LTD or its order.

15. This being in the nature of public litigation, each party shall bear its own costs.

It is so ordered.

Dated, signed and delivered at Nakuru this 27th day of May, 2014

M. J. ANYARA EMUKULE

JUDGE