



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 171 OF 2013

DAVID CHACHA KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant is David Chacha Kamau who is the owner of motor vehicle KAX 917M Mitsubishi, which was forfeited by the trial court in the court's ruling of 8/8/2013. The appellant was not one of the accused in the case before the trial court. Before the trial court, were four accused persons namely; Joseph Macharia Wangui, Joel Kihilo Gathuo, Simon Ndungu Kirancha and Joseph Chacha Nguro. They were charged with the following offences:-

- 1. Being in possession of forest produce contrary to Section 51(1)(a) as read with Section 52(2) of the Penal Code. It was alleged that on 17/10/2012 at Geta State Forest in Nyandarua County, were found in possession of 300 pieces of red cedar posts without a permit from the Chief Conservator of Forest, all worth Kshs.60,000/-;**
- 2. They were jointly charged with transporting forest produce during odd hours contrary to Section 54(1)(b) of the Forest Act No. 7 of 2005. After a full trial the accused persons were convicted on the first count but were acquitted on count II as the court found that they were not transporting the wood;**

Although no mention was made of count III, count III they had been withdrawn.

After the accused persons were convicted, the appellant addressed the court and informed the court that he did not allow the driver to carry logs but allowed him to do legal business. The driver who was the 1st accused also addressed the court in reply and said that the owner of the lorry told him to go and load the forest produce and that the owners had a permit. It is following that address that the court said that:-

“...it is evident the owner allowed the driver to use the motor vehicle to carry the forest produce. The lorry KAX 917M is thus forfeited to the State.”

It is against this ruling that the appellant appeals and has cited five grounds of appeal which are as follows:-

- 1. The learned trial magistrate erred in law and fact in forfeiting motor vehicle registration No. KAX 917M Mitsubishi even after acquitting the accused persons in count II with the offence of transporting forest produce without a movement permit contrary to Section 54(1)(1)(c) of the Forest Act No. 7 of 2005 as the court found that the vehicle was stationary and the court**

was not required to assume that the accused were to transport the forest produce hence the offence of transporting forest produce without a movement permit was not committed. A serious miscarriage of justice was occasioned;

2. **The learned trial magistrate erred in law and fact in forfeiting the motor vehicle registration No. KAX 917M Mitsubishi on the basis that the owner had allowed the driver to use the motor vehicle to carry the forest produce even after finding that the vehicle was stationary and that it should not have been assumed that the driver and turn boy were to transport the produce even after loading the same;**
3. **The learned trial magistrate erred in law and fact in forfeiting the motor vehicle registration No. KAX 917M Mitsubishi on the basis that the vehicle was carrying forest produce and in not finding that the offence of transporting the forest produce in count II was preferred under Section 54(1)(c) of the Forest Act No.7 of 2005 which is wrong section of the law;**
4. **The learned trial magistrate erred in law and fact in not finding that under Section 55(1)(c) of the Forest Act 2005, it is not mandatory to forfeit any vessel or vehicle hence if the court was to proceed with forfeiture it was mandatory to comply with the provisions of Section 389A (1) & (2) of the Criminal Procedure Act Cap 75 of the Laws of Kenya. The failure to comply occasioned a serious miscarriage of justice;**
5. **The learned trial magistrate erred in law and in calling the 1st accused who had immediately before been convicted to give an unguarded and untested statement regarding the appellant without considering what the 1st accused had said in his defence and the prejudicial effect of the statement thereof. A miscarriage of justice was occasioned.**

The appellant prays that the order of forfeiture be set aside and the vehicle be released him.

Mr. Gichuki, counsel for the appellant urged that since the accused persons were acquitted of count II, on the offence of transporting forest produce, because there was no evidence of transporting forest produce, it was erroneous for the court to go ahead to forfeit the vehicle. He submitted that forfeiture is provided for under **Section 55(1)(c)** of the **Forest Act** but the **Section** does not provide for the procedure and therefore the court should fall back on **Section 389(A)** of the **Criminal Procedure Code** which requires that notice be issued to the owner of the goods to be forfeited and the owner of the goods be given an opportunity to show cause why the goods should not be forfeited; that the said procedure was not followed; that what the court did was prejudicial to the appellant because he did not have a chance to cross examine the driver.

Mr. Chirchir, the learned counsel for the State conceded the appeal on the grounds that **Section 389(A)** of the **Criminal Procedure Code** had not been complied with; that during the hearing of the case, the lorry had been released to the appellant and he had complied with the orders of the court and availed it in court whenever it was required; and that having acquitted the accused of count II, an order of forfeiture should not have been made.

As the first appellate court, it is my duty to analyze the evidence afresh and arrive at my own independent findings.

Having considered all submissions on appeal, I observe the court did not specify under what section the order of forfeiture was made. **Section 55(1)** of the **Forest Act** reads as follows:-

“55.(1) Where a person is convicted of an offence of damaging, injuring or removing forest produce from any forest, the court may in addition to any other ruling order –

- a. **that such person pay to the forest owner, by way of compensation, a sum equal to the determined value of the forest produce so damaged, injured or removed and where the value cannot be estimated, ten thousand shillings for each offence;**

- b. **if it is proved to the satisfaction of the court that the person so convicted is the agent or employee of another person, that other person to pay by way of compensation to the forest owner, the value of the forest produce, unless after hearing that other person, the court is satisfied that the offence was not due to his negligence or default;**
- c. **the forest produce be removed, and any vessels, vehicles, tools or implements used in the commission of the offence, be forfeited to the service;**

provided that the value of the forest produce shall be either the commercial value of the forest produce or the cost of repairing the damage caused to biodiversity as a result of the activities complained of.”

It is true that the above section does not set out the procedure by which the court will make an order of forfeiture. The court would therefore need to fall back on **Section 389(A)** of the **Criminal Procedure Act** 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.”

Taking into account the above provision, and considering at what transpired in court on 8/3/2013, it is obvious that the procedure envisaged under **Section 389(A)** was not complied with. Though the appellant was in court, he should have been issued with a proper notice to show cause why the vehicle should be forfeited to the State. He was just ambushed by the court to say something after the judgment and after hearing the driver (accused 1) made a determination. The appellant should have had ample notice, given his explanation, then had a chance to cross examine the accused or even call witnesses if it was necessary. Failure to follow due process before the order of forfeiture was made was an error and prejudicial to the appellant.

In addition to the above, I do agree with the appellant that the order of forfeiture did not have any basis. The driver (accused 1) was acquitted of count II, the court having found that no forest produce was transported. So what did the lorry transport that necessitated the order of forfeiture? The order was made in error and cannot stand.

In the end, I allow the appeal, quash the order of forfeiture and direct that the subject motor vehicle be released to the appellant forthwith.

DATED and DELIVERED this 16th day of March 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Gichuki for the appellant

Mr. Nombi for the State

Appellant- present

Kennedy – Court Assistant