



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL REVISION NO. 7 OF 2014

REPUBLIC

VERSUS

MARGARET WAWERU APPLICANT

RULING ON REVISION

1. By a letter dated 9/4/2014 by the firm of **S.N. Thuku Advocates** referred this matter to this court seeking that the orders of forfeiture of motor vehicle Reg. No. **KBP 117 X** issued on 9/4/2014 by the **Principal Magistrate's Court, Kilungu**, be reviewed for the following reasons:-
 1. **"The trial court lacked jurisdiction to order forfeiture of the vehicle under the section 275 of the Penal Code under which Accused persons were charged as that section does not provide for forfeiture of any assets or goods.**
 2. **The trial court failed to appreciate that the owner of motor vehicle Registration No. KBP 117 X was not privy or an accessory to the charges facing the accused.**
 3. **The trial magistrate relied on extraneous matters and opinions in making his order for forfeiture.**
 4. **The affidavit by Margaret Waweru sworn on 18th March 2014 was unopposed by the prosecution and neither were the contents thereon cross-examined by either the court or the prosecution and all this was ignored and/or unappreciated by the trial court.**
 5. **The trial court failed to appreciate the business conducted by Margaret Waweru as well as the Certificate of Registration of the business supplied to the court and that good cause had been shown by Margaret Waweru to warrant forfeiture of the vehicle.**
 6. **The trial magistrate failed to appreciate that PW6 Cpl. Rimba Kitsao had in cross examination by the 1st accused person stated on oath that the motor vehicle Registration No. KBP 117 X was on car hire (Refer to page 3 of the judgment.)"**
2. The background facts are that on 10/10/13, the three accused, **Lee Kariuki Wambua** (1st Accused), **Peter Miru Wairigi** (2nd Accused) and **Dancan Wachira Kinyua** (3rd Accused) were arraigned before the **PM's Court, Kilungu** in **Criminal Case 126/13** with the offence of stealing contrary to **section 275** of the **Penal Code**. The particulars of the offence were that on the 8th day of October, 2013 at **Kaketa River, Thumbi village, Kilome Sub-location, Mukaa Location, Kilome Division, Mukaa Sub County** within **Makueni County** jointly with another not before court stole one roll of electricity wire valued at Kshs.734,802/= the property of **Savannaland Enterprises**.
3. Count II –Accused 1 (**Lee Kariuki Wambui**) was charged with the offence of conveying suspected stolen property contrary to **section 323** of the **Penal Code**.

The particulars of the offence were that on the 8th day of October, 2013 at **Kaketa River**,

Thumbi village, Kilome Sub-location, Mukaa Location, Mukaa Sub County within **Makueni County** being the driver of motor vehicle Registration No. **KBP 117 X Toyota Noah** dark in colour having been detained by **AP Cpl Douglas Kalu Machagusi** and **APC Douglas Mitu** as a result of the exercise of their powers conferred by section 26 of the **Criminal Procedure Code** was conveying one roll of electricity wire reasonably suspected to have been stolen or unlawfully obtained.

4. Count II – Accused 2 (**Peter Miru Wairigi**) was charged with the offence of personating a public officer contrary to **section 105 (b)** of the **Penal Code**.

The particulars of the charge were that on the 8th day of October, 2013 at **Kaketa River, Thumbi village, Kilome Sub-location, Mukaa Location, Mukaa Sub County** within **Makueni County**, falsely presented himself to be a person contracted by Kenya Power to remove one roll of electricity wire from **Kaketa River** to another site at **Kathonzweni**.

5. After a full hearing each of the accused persons was convicted for the offence of stealing contrary to **section 275** of the **Penal Code** and sentenced to serve one year imprisonment. The one roll of electricity was released to the complainant, **Savannaland Enterprises**. The trial magistrate then proceeded to issue a Notice to Show Cause under **section 389 A** of the **Criminal Procedure Code** why the motor vehicle registration No. **KBP 117 X** make **Toyota Noah** should not be forfeited to the State. The notice was addressed to the registered owners of the motor vehicle **Remu Ltd** and **Margaret Waweru**.
6. **Margaret Njeri Waweru** filed an affidavit in opposition to the intention to forfeit the motor vehicle and appeared in court on 25/3/2014 with her Advocate, **Mr Thuku**. Briefly stated, the said **Margaret Njeri Waweru** stated that the **Remu Ltd** is the financier of the motor vehicle in question. That she is the owner of the motor vehicle and uses the same to operate a tours and car hire business in the name and style of **Marga Tours and Safaris**. It was averred that the motor vehicle was hired on 8/10/2013 for one day to go to **Emali** for Kshs.4,500/= by the 1st Accused who paid Kshs.1,500/= through “**Mpesa**” and Kshs.3,000/= in cash. Any knowledge of the illegal acts by the Accused persons or their proxies were denied.
7. Annexed to the affidavit are copies of the following documents:-
 - v. **The Certificate of Registration of the business name “Marga Tours & Safaris”.**
 - v. **The copy of records from Kenya Revenue Authority (KRA) for the motor vehicle in question.**
 - v. **Loan application and statement of account.**
 - v. **The log book for the motor vehicle.**
 - vi. **The National Identity Card for Margaret Njeri Waweru.**
 - v. **Car hire agreement between Marga Tours & Safaris and the 1st Accused with copies of national Identity Card and driving license for the 1st Accused and Mpesa statement which reflects a transaction of Kshs.1,530 on 8/10/2013 at 11.05 received from telephone number 0725841797 received from Lee Kariuki (1st Accused).**
 - v. **A statement recorded by Margaret Njeri Waweru at Kilome Police Station on 11/10/13 where the vehicle had been detained following the arrest of the accused persons.**
8. On 25/3/2014 **Margaret Njeri Waweru** the owner of the motor vehicle appeared in court. Her advocate **Mr Thuku** made submissions which essentially reiterated the contents of the affidavit. The court then proceeded to fix a ruling date. The ruling delivered on 9/4/2014 gives the reasons why the trial court arrived at the finding that the said motor vehicle owner had not shown sufficient cause why the motor vehicle should not be forfeited to the State. The court then proceeded to forfeit the motor vehicle to the State.
9. **Section 389 A** of the **Criminal Procedure Code** provides as follows:-

“ (1)Where, by or under any written law (other than section 29 of the Penal Code), any goods or things may be (but 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 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 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.”

10. The court therefore has jurisdiction to order forfeiture under **section 275** of the **Penal Code** in appropriate cases.
11. The trial magistrate however erred in the procedure adopted when the owner of the motor vehicle appeared in court. The owner of the vehicle filed an affidavit and her advocate made submissions in court. The owner of the motor vehicle was not called upon to be cross-examined on the contents of the affidavit, yet the trial court relied on the contents of the said affidavit to arrive at the ruling complained of. With the unchallenged affidavit evidence, there was no basis for the trial court to arrive at the conclusion that the contents of the affidavit which were backed by documentary evidence were not credible. Had the owner of the motor vehicle been subjected to cross-examination, she may have probably explained the issues raised by the trial court regarding the car hire agreement, licence to use the motor vehicle for hire, inspection sticker, certificate of insurance, payment for the care hire, colour of motor vehicle etc. In any event, the motor vehicle owner was not on trial for any other transgressions. The owner of the motor vehicle was in court to show cause why the motor vehicle should not be forfeited for being connected with the commission of the offences that were before the court.
12. For the reasons stated above, I find this case suitable for this court’s intervention by way of revision. With the motor vehicle owner’s unchallenged affidavit evidence, it was demonstrated that the motor vehicle should not have been forfeited in the first place. In the circumstances, it is not necessary to refer the matter back to the trial court.
13. Consequently, I allow the application for revision and set aside the order of forfeiture. I order that the motor vehicle registration **KBP 117 X** be released to the owner, **Margaret Njeri Waweru**.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 24th day of June 2014.

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JUDGE