



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 9 OF 2012**

**JOSEPH MWANGI WACHIRA .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**From original conviction and sentence in Cr. Case No. 7 of 2012 at the Principal Magistrate's Court  
Siakago by HON. A.N. TUTA– SRM on 19/01/2012**

**J U D G M E N T**

1. **JOSEPH MWANGI WACHIRA** the appellant herein is the registered owner of a lorry registration number KBB 964K. This lorry was used in unlawful harvesting of sand from Thura river on 2<sup>nd</sup> January 2012.
2. Three persons namely James Muturi, Bernard Kivuti and Bernard Maina who were the accused in Siakago Principal Magistrate's Criminal Case No.7/12 were charged and convicted of the said offence. They were each fined shs.15,000/= in default eight (8) months imprisonment. There was also an order of forfeiture of the lorry and the sand. It is this order of forfeiture of the lorry that is the subject of this appeal.
3. The appellant had through the firm of E. Njiru filed nine (9) grounds of appeal. However when the appeal came for hearing he abandoned some grounds. Those argued were the following;
  - i. The trial Magistrate erred in law and fact in finding and concluding that the appellant knew the nature of business the 3<sup>rd</sup> accused, Bernard Maina was engaged in while using the appellant's motor vehicle registration number KBB 964K, without any evidence whatsoever to support that finding and conclusion; and solely relied on unsubstantiated assumptions in arriving at this finding and conclusion.
  - ii. The trial Magistrate erred in law and fact in finding and concluding that the appellant was the beneficiary of the proceeds from the sand harvested by the three accused persons, without any evidence whatsoever to support that finding and conclusion; and solely relied on unsubstantiated assumptions in arriving at the finding and conclusion.
  - iii. The trial Magistrate erred in law and ruling that the appellant was insincere yet the appellant's sworn testimony was not subjected to any cross examination by the prosecutor or the court to warrant such a finding of insincerity.
  - iv. The trial Magistrate erred in law and fact in failing to accord the appellant the benefit of doubt based on his sworn and unchallenged testimony and thereafter release the motor vehicle registration number KBB 964K to the appellant.
  - v. By ordering the forfeiture of the appellant's motor vehicle registration number KBB 964K, the trial Magistrate erred in law and fact by exercising the discretion conferred by section 146(1) of the Environmental Management and Conservation Act, 1999 in an excessive and unproportional manner, considering that the appellant was innocent and not amongst the persons charged with the

primary offence.

4. In his submissions Mr. E. Njiru while referring to the evidence on record submitted that there was no evidence to confirm that the appellant was aware of the nature of work the suspects were using the lorry for. He further submitted that when the appellant was summoned to show cause why the lorry should not be forfeited, he was never cross-examined over his sworn evidence. And that there was no evidence showing that the appellant was a beneficiary of the sand harvesting, and that he was insincere.
5. His final submission was that under section 146(1) of the Environmental Management and co-ordination Act the court has discretion which must be exercised judiciously and that this was not the case in this matter.
6. Mr. Miiiri the learned State Counsel opposed the appeal and he made submissions. He submitted that the Appellant never said he gave the suspects money for buying sand. And that he never produced receipts showing he used to purchase sand from sites as per the regulations.
7. This appeal relates to the decision of the trial court to forfeit the appellant's motor vehicle lorry registration number KBB 964K to the State. The appellant was not one of the accused persons in Siakago Principal Magistrate's Criminal case number 7/12. The three accused persons in the said case had been charged with the offence of excavating sand from a river without prior written approval of the director general of National Environment Management Authority contrary to section 42(1) (b) and 5 as read with section 144 of the Environment Management & Co-ordination Act 1990.
8. The three accused persons admitted the charge and the facts. They were convicted and each fined shs.15,000/= in default eight (8) months imprisonment. Thereafter the trial court issued summons to the owner of the lorry who is the appellant to show cause why the said lorry would not be forfeited. After hearing him the court decided that the motor vehicle should be forfeited. This is the decision that aggrieved the appellant.
9. As a first appeal court I have a duty of re-evaluating and re-considering the evidence on record and arriving at my own conclusion. I should not overlook the findings of the trial court. See **OKENO –V- REPUBLIC [1972] EA 32; SIMIYU & ANOTHER –V- REPUBLIC [2005]1 KLR 192.**
10. And having carefully considered the evidence on record, the grounds of appeal and the submissions on record, I find that I only have one issue for determination. The issue is whether the learned trial Magistrate erred in making the forfeiture order.
11. The power to forfeit under Environment Management & Co-ordination Act is donated to the court by virtue of section 146 of the said Act which provides;

***Section 146 (1); The Court before which a person is charged for an offence under this Act or any regulations made thereunder may, in addition to any other order—***

- a. ***upon the conviction of the accused; or***
- b. ***if it is satisfied that an offence was committed notwithstanding that no person has been convicted of the offence,***

***order that the substance, motor vehicle, equipment and appliance or other thing by means whereof the offence concerned was committed or which was used in the commission of the offence be forfeited to the State and be disposed of as the court may direct.***

12. The key word in this provision is **“MAY”**. It therefore follows that it is not in all cases that an order of forfeiture is made. It is a discretionary exercise of authority which must be exercised judiciously. The court must be satisfied that the order is deserving.
13. In the instant case the first two accused were loaders of the sand and they said they were not aware that a licence was required. In mitigation the 2<sup>nd</sup> accused said at page 4 line 17-18;

***“I was hired to load the lorry with sand. The lorry owners escaped”.***

Further the 3<sup>rd</sup> accused stated at page 4 line 21-24;

***“I have been harvesting sand all along in this area but I have never been asked about the licence. I had not filled the lorry with sand. Am the driver of the lorry, the lorry owner Joseph Mwangi Wachira works in Nairobi”.***

14. From the above mitigation the question the court ought to have asked was who these “owners” who escaped were. It is obvious it was not the appellant. Given that the appellant was the owner and the 3<sup>rd</sup> appellant was the driver, the court should have investigated whether indeed what the 3<sup>rd</sup> accused was found doing was what he had been instructed to do by his employer. Could the 3<sup>rd</sup> accused have taken advantage of the appellant’s absence to do his own business? If not who are these employers that the 2<sup>nd</sup> accused mentioned in his mitigation?
15. When the appellant appeared before the court on 12/1/2012 to show cause, he gave his evidence on oath in the presence of the learned trial Magistrate and the prosecutor. None of these officers who were entitled to cross-examine him did cross-examine him. This in essence meant whatever he told the court was true and was wholly accepted by the court.
16. Having failed to cross-examine the appellant on what the latter had said in evidence and what the accused persons had said in court, the learned trial Magistrate erred by making the findings which were not based on any evidence. The appellant had not been an accused in the criminal trial and so was not present in court on 3/1/2012 to hear what his driver said. It was the duty of the court to explain to him what the driver had said and demand for a response from him.
17. There is absolutely no evidence to show as is suggested by the learned trial Magistrate that the appellant was a beneficiary of the unlawful acts of the driver and that indeed knew the kind of business the lorry was carrying out being excavating sand.
18. My finding is that the learned trial Magistrate made several assumptions not based on evidence to arrive at the decision she did. She ended up punishing the appellant without proof that he sanctioned the performance of the illegal activities his driver and loaders were involved in.
19. The result is that the appeal is well founded. I allow it and set aside the decision to forfeit the appellant’s lorry registration number KBB 964K IZUSU lorry. The said lorry to be restored to the appellant if it’s not yet with him.

**DATED, SIGNED AND DELIVERED AT EMBU THIS 31<sup>st</sup> DAY OF JULY 2014.**

**H.I. ONG'UDI**

**JUDGE**

**In the presence of:-**

**Mr. Miiri for State**

**Mr. Njage for E. Njiru for Appellant**

**Njue/Kirong – C/c**