**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Judicial Review 64 of 2009**

**PETERSON NJUE NJERU…....…1ST APPLICANT/SUBJECT**

**RACHEL W. NJOROGE……2ND APPLICANT/SUBJECT**

**VERSUS**

**MARALAL SNR. R. MAGISTRATE.....……1ST RESPONDENT**

**ATTORNEY GENERAL……2ND RESPONDENT**

**AND**

**KENYA FOREST SERVICE……..……INTERESTED PARTY**

**RULING**

The applicant having obtained leave to institute judicial review proceedings against the respondents and the interested party, filed the instant motion for orders of certiorari to quash the decision of the Maralal, Senior Resident Magistrate, M.K. Nyarango in Criminal Case No.395 of 2008 in which the learned magistrate ordered the forfeiture of motor vehicle Registration No.KAU 745P to the Forest Service.

The application is premised on the grounds that the applicants who are husband and wife jointly own a business venture known as Timu Sales; that motor vehicle Registration No.KAU 745P Isuzu lorry is registered in the name of Timu Sales; that in the course of their business, they hired out the said lorry to one Lydia Munuhe to transport wheat from Narok to Nairobi; that on 26th November, 2008, the 1st applicant was informed that the lorry had been held and the driver arrested for transporting protected tree species, the sandal wood; that the 1st applicant and the driver of the lorry were charged jointly with the offence of being in possession of sandal wood contrary to **section 34(1)** and **(2)** as read with section **55(1)(c)** of the **Forest Act**; that the 1st applicant was acquitted under **section 210** of the **Criminal Procedure Code** while the driver was convicted and sentenced to a fine of Kshs.250,000/= or in default to a term of one (l) year imprisonment; that in sentencing the driver, the learned magistrate ordered the forfeiture of the lorry to the State; that in making the order of forfeiture, the learned magistrate failed to give the applicants who were the owners of the lorry a hearing, hence this application.

The respondents have not replied to this application while in their grounds of opposition, the interested party has averred that the application is bad in law, inapt, misconceived and incompetent; that the application does not fall within the provisions for granting *certiorari;* that it has no sufficient grounds and; that the forfeiture order is reasonable.

Both sides relied on several authorities in support of their respective arguments. For instance, the combined

effect of the
applicant's authorities is to the effect that before an order of forfeiture can be made, any party who may be affected by it must be
heard. They have also relied on the provisions of **section 131** and **389 A(1)** of the **Criminal Procedure Code**. It is also the argument of learned counsel for the applicants that **section 55(1)** of the **Forests Act, 2005** did not impose a mandatory duty on the trial court to forfeit the lorry and that although there is no provision in that Act for the applicants to be heard before the forfeiture, the court was duty bound to hear them.

The respondent's argument, on the other hand is to the effect that **section 55(1)** aforesaid does not require the trial court to hear any party before a forfeiture order is made. The respondent relies on the authority of **Muya** Vs. **Republic** (2004) 1KLR 515 a decision based on the repealed **Forests Act (Cap 385).** It is necessary to compare the two provisions of the repealed legislation and those of the present Act.

**Section 14(2)(c)** the **Forest Act** (the repealed Act) provided that –

> **"14. (2) Where a person is convicted of an offence whereby forest produce has been damaged or injured or removed, the court**



> **shall, in addition to any other penalty, order that person –**
> **(a)**
> **……..**
> **(b) ……..**
> **(c) The forest produce removed and any tools or implements used in the commission of the offence be forfeited to the Chief Conservator of Forests."**

(Emphasis supplied)

**Section 55(1)(c)** of the **Forest Act, 2005** provides that-

> **"Where a person is convicted of an offence of damaging, injuring, removing forest produce from any forest, the court may, in addition to any other ruling order**
> **(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."**

(Emphasis supplied)

Note that in the repealed Act, the word *"shall"* has been used while in the **2005 Act**, the word used is *"may"*.

**Wakitata** Vs. **Republic** (1977) KLR 619, was a decision on, among other things, the interpretation of **Section 56(2)** of the **Wildlife (Conservation & Management) Act** which provides as follows;

> **"56. (2) Upon the conviction of any person for an offence against this Act which relates to more than one animal or trophy, the court *may***
> **inflict an additional punishment in respect of each animal or trophy after the first of a fine**



> **not exceeding Shs.6,000.00 or one half of the fine prescribed by this Act for such offence, whichever is less."**

The court held as follows:

> **"We have emphasized the word *"may"* because we are of the view that it gives a**

**discretion to a court whether or not to impose separate fines for additional animals or trophies. This is to be contrasted with somewhat similar provisions in section 47(2) and (3) of the Wild Animal Protection Act (which was repealed by the present Act….) where the word *"shall"* was used regarding penalties for additional animals, which the Court of Appeal for East Africa has held to be a mandatory sentence (see Hassan Vs. The Republic (1975) EA 221"**

Similarly, I come to the conclusion, on this point, that it was not automatic upon conviction for the learned magistrate to order forfeiture of the lorry.

The next question is whether the applicants were entitled to be heard before the court made the order of forfeiture. An order of *certiorari* will be issued by the High Court to quash a decision made by a public body if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with.

The Court of Appeal, in the case of **Prime Salt Works Ltd**. Vs. **Kenya Industrial Plastics Ltd**. (2001) 2EA 528 has observed that implicit in the concept of fair adjudication lie two cardinal principles namely that no man shall be a judge on 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.

In the court below, it became apparent that the lorry did not belong to the driver who was eventually convicted. The 1st applicant was as a matter of fact charged with the offence in question as the owner of the lorry. He was acquitted under **section 210** of the **Criminal Procedure Code**. He therefore did not have the opportunity to explain his circumstances to the court.

From the copy of the Log Book, it is also clear that the motor vehicle is registered in the joint names of Timu Sale and Stanbic Bank. Further it is apparent that the applicants carried on business under the business name of Timu Sales.

In the result, I find that, without hearing persons having interest in the lorry, the learned trial magistrate was in violation of the rules of natural justice. Consequently, an order of *certiorari* shall issue to quash her decision of 22nd May, 2009 in so far as it relates to the forfeiture of the lorry. It is further ordered that the lorry to remain under the custody of the Forest Service until the applicants or any other interested party have been heard.

I award costs to the applicants.

**Dated, Signed and Delivered at Nakuru this 29th day of January, 2010.**

**W. OUKO**

**JUDGE**