



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

- 1. SHAHI MRIZA**
- 2. WILLIAM NYAWALI**
- 3. ALI JUMA**

4. HAMISI LUMBAMBO APPELLANTS

- Versus -

REPUBLIC RESPONDENT

RULING ON REVISION

The accused persons in this case were charged in the lower court with gambling in a public place contrary to Section 55(1) as read with Section 57 of the Betting Lotteries and Gaming Act, Cap. 131 of the Laws of Kenya; and causing obstruction in a public place contrary to By-Law 256(ii) of the Mombasa Municipal By Laws.

All the four accused pleaded guilty to each of the two counts, consequent upon which they were all convicted. Each accused was sentenced to a fine of Kshs. 3,000/- on count 1 and in default 1 month imprisonment; and a fine of Kshs. 2,000/- and in default 1 month imprisonment. The trial court also ordered that the exhibits be forfeited. The matter has been referred to this court under Section 363(2) of the Criminal procedure Code, it being the contention of the lawyers for the accused persons that the order for forfeiture was unlawful.

I have read carefully the provisions of Sections 55(1) and 57 and Gaming Act, as well as By-Law 256 (ii) of the Mombasa Municipal By-Laws. The only penalty prescribed for an offence under Section 55(1) of the Act is a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months or both. A similar sentence is replicated in Section 57(4) in respect of offences in contravention of the conditions specified in subsections (2) and (3) of that Section. There is no reference to forfeiture anywhere within the purview of those Sections.

With regard to By-Law 256 (2) of the Mombasa Municipal By-Laws, I note that the entire by-law reads as follows-

“256. (1) Any person who shall place or leave or allow or cause to be placed or left any vehicle or

article or material in a street in such a manner that it causes or is likely to cause an obstruction to persons or vehicles using the street shall be guilty of an offence.

(2) The council may remove any vehicle or article or material which has been placed or left in a street in contravention of this by-law and impound the same.”

I also note from the record of proceedings that after the accused pleaded guilty, the prosecutor addressed the court thus-

“Facts as per charge sheet. Exhibits before court. They include cards, book, T.V., Radio, cooking stove, T.V stand which I do apply for forfeiture.”

The court then proceeded to convict all the accused on the plea of guilty as charged; fined all of them, and ordered the exhibits to be forfeited.

Two points arise from those circumstances. Firstly, the accused persons should have been requested to confirm whether the facts as stated by the prosecutor were true. But that was not done. However, it is not of any consequence seeing that the concern of the accused is not the fine but the forfeiture of the exhibits. This brings me to the second point, which is that Mombasa Municipal By-Law 256(2) does not provide for the forfeiture of vehicles, articles or materials which have been placed or left in a street. It merely states that the Council may remove such items and “impound the same.” The issue therefore narrows down to whether to “forfeit” and to “impound” mean one and the same thing.

The Oxford Advanced Learner’s Dictionary of Current English, 5th edition, defines “impound” at page 597 as-

“to take legal possession of something.”

It gives by way of example the use of the word as follows-

“The police impounded his car as evidence.”

The same dictionary defines forfeit and gives an example of the use of that word at page 462 as follows-

Definition – *“forfeit – to give up something or have something taken away as a consequence of or punishment for having done something wrong.”*

Example – *“Passengers who cancel their reservations will forfeit their deposit.”*

Osborne’s Concise Law Dictionary defines “impound” thus –

“To put distrained cattle or other goods in a pound or to keep them as security ...”

And the Advanced Learners Dictionary defines “pound” as –

“(a) a place where motor vehicles that have been parked illegally are kept until their owners pay to have them released.

(b) a place where cats and dogs that have been found wandering in the street are kept until their owners claim them.

Osborne’s Concise Law Dictionary defines “forfeiture” as-

“The deprivation of a person of his property as a penalty for some act or omission.”

And in the case of Re LEVY 30 Ch. D. 119, Kay J. defined “to forfeit” as-

“... to lose by some breach or condition; to lose by some offence.”

From these definitions, it is clear that to forfeit leads to the loss of one's property, but to impound does not necessarily do so. The Municipal by-laws do not provide for forfeiture. They only provide for impounding which falls short of forfeiture

For the above reasons, the order for forfeiture of the goods in question was made without jurisdiction and the same is hereby set aside. It is so ordered.

Dated at Mombasa this 6th day of April, 2009.

L. NJAGI

JUDGE