REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Criminal Appeal 135 of 2005

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BISHAR HASSAN MOHAMED …….APPELLANT

VERSUS

REPUBLIC ……...……RESPONDENT

(From the Original Conviction and Sentence)

JUDGMENT OF SENTENCE

The appellant, Bishar Hassan Mohamed, was on his own plea, convicted and sentenced by the Wajir Resident Magistrate's Court in Criminal Case Number 46 of 2004 of the offence of Being in possession of uncustomed goods contrary to section 185(d) and section 196© and section 197(1) of the Customs and Excise Act Cap 472 of the Laws of Kenya. He was sentenced to a fine of Kshs.20000/- in default of which he would go to prison for 12 months. The goods, which consisted of a motor vehicle, were ordered forfeited to the state. The appellant appealed on both the conviction and the sentence.

By a judgment of this court delivered on 18.11.2005, the appeal on the conviction was dismissed, thus upholding the judgment on the conviction of the lower court. However, since little arguments had been offered to the court on sentence, both counsel were invited by the court to submit on sentence. This was finally done on 30.10.2007, making way for this judgment on sentence only.

Mr. Konya who argued for the appellant did not say that the sum of Ksh.20,000/- imposed as fine was excessive. He concentrated on the issue of the forfeiture of the motor vehicle. He effectively stated that the forfeiture of the motor vehicle was harsh and excessive and sought that this court, in its discretion, would override the trial magistrate's order on forfeiture. He suggested that the fine of Kshs.20,000/- was enough and that this court should release the motor vehicle to the appellant who would however be subjected to all the relevant taxes and penalties due under the relevant law. That once he pays those, the vehicle should be returned to him for the relevant registration after which he would use it in the normal way.

On the other hand Mr. Omirera for the Republic, saw it differently. He argued that the provisions under which the appellant was convicted, did not give the trial court, or this court, any discretion to decide the issue of forfeiture. He argued further that once there is a conviction, the sentence included an automatic forfeiture of uncustomed goods. The two counsel referred me to sections 201, and 203 of Customs and Excise Act, Cap 472 of the Laws of Kenya.

The provisions under which the appellant was charged and pleaded guilty were section 285(d), (iii) and section 196© as read with section 197 (1) of the Act. It reads: -

"**Section 185. Any person who –**

acquires, has in his possession, keeps or conceals, or procures to be kept or concealed, goods which he knows, or ought reasonably to have known to be-

(iii) Uncustomed goods,

shall be guilty of an offence and liable to imprisonment for a term of not exceeding three years or to a fine of not exceeding five hundred thousand shillings or to both."

Section 197(1) reads: -

"**A vessel……. And a vehicle, animal or other thing made use of in the importation, landing, removal, conveyance, carriage….. or exportation of goods ……. liable to forfeiture under this Act, shall itself be liable for forfeiture ……"**

I have carefully read the provisions under which the appellant was convicted. Since there is now no doubt about the appellant's conviction, the issue, which arises, is whether or not the motor vehicle imported without being customed was due to forfeiture. A careful perusal of Section 185 will in my view show that the only punishment thereunder provided is a maximum of three years imprisonment or a maximum fine of Kshs.500,000/- or both. No forfeiture is provided under the said section.

In purporting to forfeit the appellant's motor vehicle therefore, the trial Magistrate must have read section 185(1) with section 197(1) as clearly drawn in the charge that the appellant was facing. He clearly therefore forfeited the motor vehicle under section 197(1). Unfortunately, the section referred to vessels which are used to carry or convey the goods which are found to be uncustomed. While such vessels are clearly liable to forfeiture under section 197, they are not the actual goods carried in the vessels. In using the section to forfeit the motor vehicle, the trial magistrate in my considered opinion, erred in law.

Under the above circumstances, it might seem that the forfeiture of the appellant's motor vehicle should not have been made. The error clearly arose from the hand of the drafter of the charge sheet who wanted the offence allegedly committed by the appellant at the beginning under section 185 (d) (iii) to be read together with section 197(1) of the relevant Act. Clearly he should have subjected the reading of Section 185 (d) (iii) to that of section 196 and section 201 of the Act. Section 196 states: -

"**S. 196, In addition to any other circumstances in which goods are liable to forfeiture under this Act, the following goods shall be liable to forfeiture –**

(a) ….

(b) …..

(c) uncustomed goods ……"

Section 201 also reads: -

"**Where a person is prosecuted for an offence under this Act and anything is liable to forfeiture by reason of the commission of that offence, the conviction of that person of that offence shall, without further order, have effect as the condemnation of that thing….."**

My understanding of the above provisions is that so long as the goods in relation of which the accused has been convicted of the unlawful possession thereof is liable to forfeiture, then a conviction carries with it the forfeiture. Put differently, the goods are automatically forfeited if the possessor is convicted of the offence charged under the Act whether or not the trial Magistrate's makes a forfeiture order or not.

In the case before me the forfeiture order was made under a wrong section. I find that the said order is erroneous and proceed to discharge it for that purpose only. I however still find that under section 196 as read with section 201, the motor vehicle is nevertheless automatically forfeited by the fact of the conviction under section 185 (d) (iii). Under these circumstances, and except to the extent I have modified the forfeiture order, the appeal on sentence is hereby dismissed.

Before I conclude the terms of this judgment, I should point out that any "***goods***" condemned to be forfeited are under section 203 as subjected to section 214 of the Act, to be sold, destroyed or otherwise disposed of as the Commissioner of Customs may think fit. Indeed, if I understand it properly, condemnation to forfeiture leaves no rights over the condemned goods except through an order of the Minister of Finance under section 204 of the Act. In this case however, there was evidence that the motor vehicle in question was sold by the orders of the Resident Magistrate, Wajir despite the fact that Wajir Criminal Case Number 46 of 2004 was a subject of Appeal of this appeal of this court, to his full knowledge. Clearly, this was a deliberate interference of the court process. There is evidence that the said motor vehicle was sold in a public auction for Ksh.105,000/-. There is no evidence that the money was surrendered to the Government, particularly to the Commissioner of Customs & Excise department to whom it would rightly belong.

This court direct that this judgment be served upon the Commissioner of Customs & Excise Department, in case the department may wish to collect the sum of money aforementioned from those who sold the motor vehicle referred to as Registration Number Somalia 67830 - Nissan Turbo from M/s Mundega Agencies of P O Box 50128, Victoria Court, 3rd floor, Room 5, Tom Mboya Street or Jogoo Road, Business Centre, 2nd Floor Telephone 551251 NAIROBI.

Dated and Delivered at Machakos this 6th December, 2007.

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D A ONYANCHA

JUDGE