



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

REVISION NO. E002 OF 2020

(Being an Application for Revision of the Sentence (Forfeiture Order) in Criminal Number MC CR. E205 of 2020 – Sotik by Hon. J. Omwange, Senior Resident Magistrate)

FAITH CHELANGAT.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. This Revision came to me through a letter addressed to the court by the Applicant's counsel. The Applicant was charged with the offence of contravening provision of preventing control or suppression of COVID-19 directive as issued by the Cabinet Secretary pursuant to Section 36 (m) as read with Section 164 of the Public Health Act Cap 242 of the Laws of Kenya.

2. The particulars of the charge were that on 22nd November 2020 at Chebirbelek in Sotik sub-county, the Applicant was found selling alcoholic drinks without observing social distance amongst her customers in contravention of directives issued by the e Cabinet Secretary for Health on prevention, control or suppression of COVID-19.

3. The Applicant pleaded guilty to the Charge and was convicted and sentenced to a fine of Kshs.20,000 and in default serve three months in prison. The court also directed that the exhibits be forfeited to the State. The Applicant paid the fine. The Applicant subsequently applied for Revision of the said orders.

4. The High Court is vested with Revisionary powers under the Constitution and **Section 362 to 366** of the Criminal Procedure Code Cap 75. More particularly, **Article 165 of the Constitution** provides as follows:-

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

5. **The Criminal Procedure Code, Cap 75** under Section 362 states as follows:-

“Power of the High Court to Call for Records:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.”

6. **Section 364** further outlines the manner in which the revision jurisdiction should be exercised. It states as follows:-

“Powers of the High Court on Revision

(1) In the case of a proceeding in a subordinate court, the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may –

(b) In the case of any other order other than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defense:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

The Applicant's case and submissions.

7. The Applicant stated that the police had no power to supervise the compliance of rules made under Section 36 of the Public Health Act. It was her case that such power was bestowed on the Director of Medical Service and his officers under Section 37 and 38 of the Public Health Act.

8. It was the Applicant's case that the forfeiture of the exhibits was not sanctioned by the law. That Sections 164 of Cap 242 did not provide for the forfeiture of the exhibits on conviction and sentence of the accused person.

9. The Applicant prayed that this court revise and set aside the sentence and the forfeiture order, the accused person be refunded the fine and the alcoholic drinks be handed over to the interested party.

The Respondent's submissions.

10. The Respondent submitted that the trial court did not follow the laid down procedure for forfeiture according to Section 349 (a) of the Criminal Procedure Code. Consequently the Respondent conceded to the Revision Application stating that no notice had been issued to the Applicant.

11. I have gone through and considered the trial court proceedings, the Revision Application dated 3rd December 2020, the Applicant's written submission dated 20th May 2021 and the Respondent's written submissions dated 22nd October 2021. The only issue for my determination is whether the Sentence and Forfeiture Order were valid.

12. The substance of the Charge was anchored on Section 36 (m) of the Public Health Act which provided that whenever any part of Kenya was threatened with any formidable epidemic, endemic or infectious disease, the Cabinet Secretary for Health may make rules for the prevention, control or suppression of the infectious disease.

13. Section 37 of the Public Health Act provides that:-

“The health authority of any area within which or part of which any rules made under section 36 of this Act are in force shall do and provide all such acts, matters and things as may be necessary for mitigating any such disease, or aiding in the execution of such rules, or for executing the same, as the case may require; and the health authority or the medical officer of health may from time to time direct any prosecution or legal proceedings for or in respect of the wilful violation or neglect of any such rules.”

Section 38 of the Act provides that:

“The Director-General for health and his officers shall have power of entry on any premises or vessels for the purpose of executing or superintending the execution of any rules made under section 36 of this Act.”

14. It is salient to note that even though the Public Health Act empowers the Health Authority or an assigned Medical Officer to execute the rules made under Section 36 of the Act, police officers are also allowed to enforce such rules. Legal Notice No. 50 (Kenya Gazette supplement No. 41) dated 6th April 2020 issued under the Public Health Act defined a law enforcement officer as either a police officer, national government administration officer or a medical officer of health.

15. From the provisions of the law which I have cited extensively above, it is clear that, contrary to the Applicant's submission, the police were clearly within the law when they enforced the COVID-19 prevention measures against the Applicant.

16. It follows therefore that the conviction was lawful. Indeed I am satisfied that the plea taking process which culminated in the Applicant's guilty plea was not irregular. Consequently I find no reason to interfere with the conviction.

17. With respect to sentence, the duty of this court on revision is to look into the legality or propriety of the sentence. I am guided by the Court of Appeal decision in **Bernard Kimani Gacheru Vs Republic (2002) eKLR**, which held:-

“It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

18. It is my finding that the trial court overlooked the fact that the assorted alcoholic drinks did not belong to the accused person. This court is therefore entitled to interfere with the sentence passed in the trial court.

19. The Black's Law Dictionary, 10th Edition defines forfeiture as the loss of a right, privilege or property because of a crime, breach of obligation or neglect of duty.

20. The law on forfeiture is contained in Section 389A of the Criminal Procedure Code which provides:-

“Where, by or under any written law (other than section 29 of the Penal Code), any goods or things may be (but are not obliged to be) forfeited by a court, and that law does 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 place, order the goods or things to be forfeited unless good 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.”

21. I agree with the interpretation of the above law by Nyakundi J. in the case of **Peter Igiria Nyambura Vs Director of Public Prosecutions (2018) eKLR**, where he stated that:-

“Section 389A provides for forfeiture determination. The elements of the section are that a court must not enter a judgment of forfeiture in a criminal proceedings unless the indictment or information contains notice to the owner of the vessel or vehicle. It is generally acceptable that the state will seek the forfeiture of the property as part of the sentence in accordance with the applicable Act.

What do I see as the key elements in an application by the state seeking forfeiture in a criminal proceedings?

(a) The state must establish the requisite nexus between the property and the offence.

(b) The courts determination may be based on evidence already on record including any plea and or adduced evidence accepted by the court as relevant.

(c) If the court seeks to forfeit a specific property a notice of the order must be sent to any person who reasonably might appear to be a potential claimant with standing to contest the forfeiture in the proceedings.

(d) This is more so when in practical terms the seized property would be in the hand of an agent, employee, or servant of the person with proprietary interest or right.

22. From the record, the trial court gave the forfeiture order promptly after convicting the Accused. The Applicant submitted that the owner of the exhibits was Rose Chemutai. That she was not given an opportunity to be heard before the forfeiture order was given. She further submitted that the police had the license which showed that the business owner was Rose Chemutai and not the accused person. It is clear from the record and a fact that the Respondent conceded that there was neither a notice issued to the accused person nor a forfeiture hearing conducted. This violated the fair hearing rights of the accused person as enshrined in Article 50 of the Constitution.

23. I agree with the reasoning of Gikonyo J. in the case of **Letiyia Ole Maine Vs Republic (2021) eKLR**, where he held:-

“According to section 24(f) of the Penal Code, forfeiture is one of the punishments that a court may inflict. Of greater significance, is that, forfeiture divests a person’s property without compensation, hence, need to ensure the process leading to forfeiture adheres to the requirements of due process to avert constitutional defences of violation of right to property, right to privacy, right to fair administrative action, and right to fair trial guaranteed in article 40, 31, 47 and 50 of the Constitution, respectively. The person who will lose the property must be afforded due process; the person may be a third party or the accused person.

Some of due process protections before forfeiture order is made include notice- replete with essential details and information inter alia on the time and place of, forfeiture proceeding and property to be forfeited- to the person who will be affected by the forfeiture to attend forfeiture hearing and determination. The trial court must conduct an inquiry or hearing for forfeiture. The person who will be affected by the forfeiture order is allowed to participate in the forfeiture proceedings and tender evidence to show cause why the property should not be forfeited. He may also appear through legal counsel or in person. The trial court then considers all relevant evidence tendered in the trial and the forfeiture proceeding in making its determination.

24. I further associate myself with the finding of Nyakundi J. in the case of **Peter Igiria Nyambura (supra)**, that:-

“The National Police Service and other similar agencies have a right to seize property associated with certain crimes. As the agency takes possession one would expect administrative action be taken to establish ownership. If the appropriate agency has probable cause to apply to the court for forfeiture, the law requires notice to be served to the owner.

The trial court must hold an inquiry where the prosecution must satisfy and demonstrate that the chattel, vessel or motor vehicle ought to be forfeited to the state. It is at that stage the owner is allowed an opportunity to raise a defence to the forfeiture. This procedure in most cases is overlooked by trial magistrates and the consequence of it has been to burden the High Court with review applications.

25. In this case therefore, it is my finding that due procedure was not followed when the forfeiture order was issued. The Applicant was not granted a chance to present her defence to the forfeiture as no hearing was conducted. The evidence on record clearly indicated that the Applicant was not the owner of the business and in this regard, there was no nexus established between the exhibits and the applicant.

26. In the final analysis, I confirm the order of Hon. Omwange convicting the Applicant. I set aside the maximum fine of Kshs.20,000/= imposed by the trial court and substitute therefor a fine of Kshs.10,000/=. The Accused shall therefore be refunded Kshs.10,000/= in paid fine in Sotik Criminal Case No. MC. CR. E0205 of 2020.

27. I find the Forfeiture Order invalid and the same be and is hereby quashed. The forfeited exhibits as contained in the inventory presented to the court by the police shall be returned to the Applicant.

28. Orders accordingly.

RULING DELIVERED DATED AND SIGNED THIS 16TH DAY OF NOVEMBER, 2021.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of the Applicant, Mr. Murithi for the Respondent and Kiprotich (Court Assistant)