



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL REVISION CASE NO. 72 OF 2019

MARY MUTINGILI LELI.....APPLICANT

VERSUS

O.D.P.P.....RESPONDENT

RULING

1. **Mary Mutingili Leli**, the Applicant herein approached the Court by way of Notice of Motion, moving it to invoke its supervisory jurisdiction over the Subordinate Court, **Mutomo Principal Magistrate's Court** presided over by **Hon. J. W. Wang'ang'a, SRM** in case No. **402 of 2019** where an order was made forfeiting motor-vehicle Registration No. **KBN 292X Toyota Ace**.

2. The relief sought is to review, vary and/or set aside the stated order and to have the subject motor-vehicle released to the Applicant.

3. The application is premised on grounds that: The Applicant is the registered owner of the motor-vehicle whose driver was charged with the offence of **Removing Forest Product Without a Valid Permit** contrary to **Section 64(1)** as read with **Section 64(2)** of the **Forest Conservation and Management Act No. 34 of 2016**, convicted and fined **Kshs. 50,000/=** that was duly paid; the Applicant was not party to the unlawful activity carried out by the Accused **Matano Nyoha** who was in possession of the Applicant's motor-vehicle; the Applicant was not served with any notice and given a chance to be heard prior to the motor-vehicle being forfeited hence the order made was unlawful and *ultra vires*.

4. The Applicant swore an affidavit where she deponed *inter alia* that: **Matano Nyoha** who was the Accused in the trial Court hired her motor-vehicle to take some goods for dowry payment to a Kamba Customary function at **Mutha Location** on **24th November, 2019**. She learned of the arrest and detention of the motor-vehicle on **25th November, 2019**; the plea was taken and the motor-vehicle forfeited to the State.

5. That she stands to suffer irreparable damage since the motor-vehicle is a security to a loan facility which she uses to carry out business and take her children to school.

6. The State did not respond to the application but through Counsel **Vincent Mamba** entered into a consent with the firm of **D. K. Mboloi & Co. Advocates** for the Applicant where it was stated thus:

"1. That the motor-vehicle Registration Number KBN 292X Toyota Townace held at Mutomo Senior Principal Magistrate's Court be and is hereby released to Mary Mutingili Leli.

2. That the trial Court misdirected itself as forfeiture of motor-vehicle KBN 292X should have been the last option since the court has a wide discretion.

3. That Section 68(2) of the Forest Conservation and Management Act and 389A of the Criminal Procedure code were not complied with.”

7. It is the duty of this Court to satisfy itself of the legality of the order made by the trial Court pursuant to the provisions of **Section 363** of the **Criminal Procedure Code**.

8. **Matano Nyoha** was accused of contravening **Section 64(1)** of the **Forest Conservation and Management Act, 2016** which provides thus:

“(1) Except under a licence or permit or a management agreement issued or entered into under this Act, no person shall, in a public or provisional forest –

(a) fell, cut, take, burn, injure or remove any forest produce;

(b) be or remain therein between the hours of 7 p.m. and 6 a.m. unless using a recognised road or footpath, or is taking part in cultural, scientific or recreational activities;

(c) erect any building or livestock enclosure, except where the same is allowed for a prescribed fee;

(d) smoke, where smoking is by notice prohibited, or kindle, carry or throw down any fire, match or other lighted material;

(e) de-pasture or allow any livestock to be therein;

(f) clear, cultivate or break up land for cultivation or for any other purpose;

(g) enter any part thereof which may be closed to any person;

(h) collect any honey or beeswax, or hang on any tree or elsewhere any honey barrel or other receptacle for the purpose of collecting any honey or beeswax, or enter therein for the purpose of collecting honey and beeswax, or be therein with any equipment designed for the purpose of collecting honey or beeswax;

(i) construct any road or path;

(j) set fire to, or assist any person to set fire to, any grass or undergrowth or any forest produce;

(k) possess, bring or introduce any chain saw or logging tools or equipment;

(1) damage, alter, shift, remove or interfere in any way whatsoever with any beacon, boundary mark, fence notice or notice board.”

The actual paragraph of the Section that sets out the prohibited activity that he violated was not stated but looking at the particulars of the offence he was stated to have been found transporting 16 sacks of charcoal and some others that were unpacked, forest produce, without a permit from Kenya Forest Management Authority. This would be envisaged to be removing forest product without a licence which could fall under **Section 64(1)(a)** of the **Act** which provides thus:

“(1) Except under a licence or permit or a management agreement issued or entered into under this Act, no person shall, in a public or provisional forest –

(a) fell, cut, take, burn, injure or remove any forest produce;”

Hence curable under **Section 382** of the **Criminal Procedure Code** that provides thus:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

The offender admitted the charge, was convicted and sentenced to pay a fine of **Kshs. 50,000/=** or in default to serve six (6) months imprisonment. None of the parties is aggrieved by the conviction and sentence. The complaint by the Applicant herein is in respect of the subsequent order made by the Court forfeiting the motor-vehicle **KBN 292X** that had carried the forest produce.

9. The order was made pursuant to **Section 68** of the **Act** that provides thus:

“(1) Where a person is convicted of an offence of damaging, injuring or removing forest produce from any forest, the forest produce shall be forfeited to the owner.

The court may in addition to any other ruling order—

(a) that such person pay to the forest owner, by way of compensation, a sum equal to the determined value of the forest produce so damaged, injured or removed and where the value cannot be estimated, ten thousand shillings for each offence:

(b) if it is proved to the satisfaction of the court that the person so convicted is the agent or employee of another person, that other person to pay by way of compensation to the forest owner, the value of the forest produce, unless after hearing that other person, the court is satisfied that the offence was not due to his negligence or default;

(c) the vessels, vehicles, tools or implements used in the commission of the offence be forfeited to the Service: Provided that the value of the forest produce shall be either the commercial value of the forest produce or the cost of restoring the damage caused to the forest as a result of the offence committed, whichever is higher.

(2) Where a person is convicted of an offence of occupying or cultivating land in a forest area without a licence, the court may, in addition to any other penalty imposed under this Act, order such person to remove any buildings, enclosures, huts or crops within a period to be specified in the order, and if the person so convicted fails to comply with an order within the period so specified, the buildings, enclosures, huts or crops shall be deemed to be the property of the Service, the County Department responsible for forestry or the private forest owner, as the case may be, and may be disposed of as the Service, County Department responsible for forestry or the private forest owner may think fit:

Provided, however, that expenses incurred as a result of keeping in custody anything seized or detained under this section shall be borne by the person whose property is seized or detained.”

10. The charcoal was forfeited to the Kenya Forest Service as required by the law.

Section 68(2) of the **Act** gives the Court the discretion to make other orders in addition including forfeiture of the vehicle used in commission of the offence. However, there is a qualification, in that there was a requirement of some fulfilment of a condition prior to the order of forfeiture being made. There was need of some evidence being tendered to establish if the person convicted was an employee/agent of another person. This would call into question of the circumstances in which the offence was committed being enquired into.

The **Act** is however silent on the procedure to be adopted. In the result, the Court is required to revert to the procedure provided for forfeiture of goods by the Criminal Code.

11. **Section 389A** of the **Criminal Procedure Code** provides thus:

“(1) 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.

(2) If the court finds that the goods or things belong to some person who was innocent of the offence in connexion with which they may or are to be forfeited and who neither knew nor had reason to believe that the goods or things were being or were to be used in connexion with that offence and exercised all reasonable diligence to prevent their being so used, it shall not order their forfeiture; and where it finds that such a person was partly interested in the goods and things it may order that they be forfeited and sold and that such person shall be paid a fair proportion of the proceeds of sale.”

12. Per the record the convict was required to show cause as to why the motor-vehicle could not be forfeited and he responded thus:

“I seek forgiveness. I did not know I was committing an offence. I was carrying some men to a place where there was a ceremony.”

13. It could not be discerned if he was an employee or authorised driver (agent) of the owner of the motor-vehicle. The Applicant herein asserts that she is the owner of the subject motor-vehicle. This would call for presentation of evidence to the satisfaction of the Court.

14. This would call for strict compliance with **Section 68(2)** of the **Act** and **Section 389A** of the **Criminal Procedure Code**.

15. In the premises, I find the order made forfeiting the subject motor-vehicle to the State having been illegal and improper. Consequently, I quash and set aside the order made by the Trial Court; and direct the file to be placed before the Senior Resident Magistrate for compliance with the law.

16. It is so ordered.

Dated, Signed and Delivered at Kitui this 9th day of January, 2020.

L. N. MUTENDE

JUDGE