



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J

CRIMINAL REVISION NO. 32 OF 2019

(From Orders in Criminal Case No. 434 of 2016 of the Chief Magistrate's Court at Naivasha – E. Kimilu, PM)

SIMON NJOROGE KIARIE.....1ST ACCUSED

SIMON NDUNGU MBUGUA.....2ND ACCUSED

MONICA NJERI MUKABI.....3RD ACCUSED

AND

KCB BANK LIMITED.....1ST APPLICANT/INTERESTED PARTY

CHARLES OMONDI ABONGA.....2ND APPLICANT/INTERESTED PARTY

-VS-

REPUBLIC.....RESPONDENT

RULING

1. The lower court, after hearing an offence of transporting charcoal without a permit, convicted the accused persons on 8th December, 2017. The driver and conductor of the motor vehicle KBT 948T Toyota D-Max Pick up admitted the offence and were convicted on their own plea of guilty. There was no dispute that the said vehicle was transporting the charcoal. The driver was the driver duly authorized by the 2nd Applicant herein to drive the vehicle.
2. Following the aforesaid determination, the trial magistrate ordered that the exhibits, including the said vehicle, be forfeited to the State.
3. The order of forfeiture was first challenged by the applicant herein by an application dated 7th February, 2018 in the lower court. However, when the application came for hearing, the trial court determined that it had finalized the case and was *functus officio*. It thus closed the file.
4. The present application was thus filed in this court seeking that the order of forfeiture be reversed and the vehicle released to the applicants. The applicants have annexed to their application copies of the vehicle registration certificate and a proforma invoice for purchase of the vehicle, both of which show that the applicants are the joint owners/purchasers of the said vehicle. They also filed a banking facility letter showing that the 2nd Applicant granted a loan to 1st Applicant to purchase the said vehicle hence the registration in their joint names. They seek release of the motor vehicle to themselves.
5. The parties filed brief written submissions in respect of the application. They also cited authorities in support of their positions. The State argues that a nexus was duly established between the vehicle transporting the charcoal and the offence as a requirement for forfeiture in terms of **Section 68 (2)** of the **Forest Conservation and Management Act**; that the driver pleaded guilty and that the 2nd Applicant had notice of forfeiture.
6. Only one issue arises for determination: Whether the trial court could or did properly order forfeiture of the applicant's vehicle.

7. **Section 68 (1)** of the **Forest Conservation and Management Act** provides that upon a conviction, a court may order vehicles, vessels or tools used in the commission of the offence to be forfeited to the Kenya Forest Service. The proviso is that the value of the forest produce is equivalent to that which can restore the damage caused.

8. **Section 68 (1)** of the **Forest Conservation and Management Act** provides as follows:-

“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.”

9. In **Peter Igeria Nyambura v Director of Public Prosecutions [2018] eKLR** which was relied on by both parties, Nyakundi J interpreted **Section 68** to mean that it:

“does not automatically allow for forfeiture of vessel, motor vehicle or article used in conveyance of forest produce. This inference can be logically drawn from the heading of Section 68 whose objective is compensation for loss or damage caused to the forest as a result of the offence committed. It is clear that there are other remedial measures to be considered by the court besides forfeiture. The right to forfeit private property must be a subject of both the constitution and the enabling statute. If there is a lacuna on the procedure on forfeiture in the primary Act the court should find recourse in section 389A of our code.”

10. That the court further stated that: “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 proceedings. I also agree with that interpretation because it is a trite rule of natural justice that a person, especially a third party whose property has been used to commit the offence, must have the right to challenge the forfeiture. Thus the court must balance competing interests.

11. The State argued that the applicant had notice of the forfeiture and referred to the 2nd Applicant’s letter annexed in the Supporting Affidavit of Catherine Wakarima Credit Administrator of the 1st Applicant as Exhibit “CW3”. I have perused the letter. It was written by the 2nd Applicant to the Judiciary on 8th November, 2016. It notes that the driver was convicted in the lower court, sentenced to 6 months imprisonment, and that he finished his term. The letter concludes:

“Am hereby requesting for the release of the vehicle looking forward for a favourable response.”

12. I do not see any indication in the letter that the applicants were served with notice of the forfeiture or even understood that was in the offing. From the proceedings in the lower court, no hearing was held to identify whose property was liable to be forfeited. In the absence of a procedure for forfeiture under the Forests Act, **Section 389A** of the **Criminal Procedure Code** would be applicable.

13. **Section 389A** of the **Criminal Procedure Code** provides for several steps summarized as follows:-

“1. Where a procedure for forfeiture is not provided under a statute the procedure should be:

1. Notice to be served on the person who is believed to be the owner.

2. The notice should specify: the goods or things to be forfeited; the time and place at which the order of forfeiture will be made; that forfeiture will proceed unless good cause to the contrary is shown.

3. If the owner of the goods or things is not known or cannot be found the notice shall be advertised in a suitable newspaper.

4. If the court finds that the goods or things to be forfeited belonged to an innocent third party it shall not order forfeiture.

5. If the court finds that the third party was partly interested in the goods or things, it may order that they be forfeited and sold on a fair proportion of the proceeds of sale be paid to that person.”

14. None of the above steps were taken by the court before the forfeiture order was made. In **Francis Mureithi Ndungu V Republic [2012] eKLR** the facts of which are similar to these in the present case, Ochieng J said:

“The order for the forfeiture of the vehicle ought not to have been made without first giving to the owner of the vehicle an opportunity to be heard. The rules of Natural Justice dictate that before any person is condemned, such as through the forfeiture of his property or the deprivation of his right to freedom, the court should give him a hearing.”

15. In the present case, it has been shown through the Vehicle Registration certificate that the vehicle belongs jointly to the applicants. There is no evidence in the trial court record that they had any interest in the subject matter of the offence. The state has not challenged the ownership of the vehicle.

16. The record shows that the 2nd Applicant’s driver admitted carrying the charcoal. In mitigation he said:

“I pray for forgiveness. I won’t repeat. I was only looking for a way of earning a living for my children.”

17. From the record I do not see any suggestion of involvement of the 1st and 2nd Applicants in the commission of the offence or the proceeds thereof. Accordingly I see no reason to remit this matter back to the trial court for determination as to why the forfeiture should not proceed. That will waste the court’s precious time.

18. In the result, I direct that the said vehicle be released forthwith to the applicants.

19. Orders accordingly.

Dated and Delivered at Naivasha this 20th Day of February, 2020.

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Ms Moenga holding brief for Muchella for 1st Applicant
2. Ms Maingi for the Respondent
3. Court Clerk - Quinter Ogutu