



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL CASE NO. 12 OF 2019

JOHN GATHOGA NDUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the order of the Hon. W. Juma, Chief Magistrate, delivered on 12th March 2019 in the Chief Magistrate's Court at Narok in Criminal Case No. 280 of 2017, R v. 1. Sidain Karenka and 2. James Kiarie Kimani)

RULING

The case for the applicant.

1. The appellant has appealed against the order of forfeiture of his motor vehicle registration No. KCDL 6321 pick-up following the conviction of the two accused in the magisterial court for the offence of transporting game meat namely giraffe meat weighing 60 KG.
2. The appellant was not an accused in the magisterial court.

The applicant's evidence in response to the notice to show cause why his motor vehicle should not be forfeited.

3. The applicant after being served with the above named show cause notice, appeared in court and testified on oath. He testified that on 18th February 2017, he was rang by his cousin (Paul Njeru), who told him that his motor vehicle had been seized at Ewaso Ngiro for carrying zebra meat. He also testified that he was at that hospitalized Kenyatta National Hospital between 1st October 2016 and 15th November 2016 following an accident. He further testified that he had a debt with Equity Bank Ltd, in respect of which he produced a copy of the log book as exhibit Exh P 1. He testified that the original log book was with the said bank.
4. The appellant was not cross examined by the prosecutor. He also was not asked any questions by the court.

The appellant's grounds of appeal

5. In this court the appellant has raised six grounds in his petition of appeal and five grounds of appeal in his supplementary petition of appeal.
6. I have perused the grounds of appeal in both petitions. I find that the most important ground is 3 of the supplementary petition of appeal. In that ground 3, Mr. D. Langat, counsel for the appellant has faulted the trial court both in law and fact in failing to issue a notice to show cause why the subject motor vehicle should not be forfeited to Equity Bank Limited, which co-owns the subject motor vehicle before forfeiting the same as provided for in section 389A of the Criminal Procedure Code (Cap 75) Laws of Kenya.

The submissions of the appellant

7. Mr. D. Langat filed written submissions in support of the appellant's appeal. In this regard, counsel submitted that the trial court in its ruling of 12th March 2019 stated in its summary of evidence of the appellant that according to the log book (the certificate of ownership) the vehicle was on loan with Equity Bank Ltd. It was his submission that the trial court failed to serve notice to show cause why the vehicle should not be forfeited upon Equity bank as a co-owner as required by section 389A of the Criminal Procedure Code.
8. Counsel cited the decision of M. J. Anyara Emukule, J, in Republic v *Ministry of Internal Co-Ordination & 2 Others, ex parte Evans Nyakwara Makori, JR. Misc. Civil Application No. 58 of 2015, [2016]e-KLR, (Mombasa)*, in which that court held that forfeiture proceedings

are the second stage of proceedings, whose sole purpose is to establish whether the registered owner of the motor vehicle or equipment was used in the commission of the offence or was privy to such use and that before the order of forfeiture is made, it must be proved beyond reasonable doubt that the applicant was involved in the commission of the offence. He urged the court to be guided by this authority.

9. Counsel also cited *Peter Igiria Nyambura v Director of Public Prosecutions, Criminal Revision No. 17 of 2018, (Kajiado)*, in which R. Nyakundi, J, held that the failure of the trial court to serve notice to show cause why forfeiture of the applicant's motor vehicle should not be forfeited under section 68 of the Forest Conservation and Management Act and under section 389A of the Criminal Procedure Code, occasioned not only prejudice but also a failure of justice against the applicant. Because of the said failure the order of forfeiture was set aside. Counsel urged the court to be guided by this authority.

The case for the respondent

10. Ms Torosi, counsel for the respondent filed written submissions in support of the order for forfeiture

11. On the question as to whether the subject vehicle was co-owned by Equity Bank Ltd, she submitted that it was up to the appellant to prove that fact. She further submitted that a certified copy of the log book that the appellant produced was not dated. Furthermore, she also submitted that the appellant did not produce proper documents to prove that Equity Bank Ltd, co-owned the vehicle. She therefore submitted that the forfeiture was proper.

12. Counsel also cited a number of authorities. She cited *Simon Mbathi Mwangi v Republic [2017] e-KLR*, in which the court (C. Meoli, J), (Naivasha registry) dismissed the appellant's appeal against the order of forfeiture of his motor vehicle for being in possession of 150 Kg of zebra meat packed in his motor vehicle without a certificate of ownership and another related offence; for the appellant was well aware of the criminal activities for which his vehicle was used two times. She also cited *William Gichure Mwangi v Republic [2017] e-KLR*, in which the court (Maureen A. Odero, J), (Nakuru registry), dismissed the appellant's appeal against an order of forfeiture of his motor vehicle that was used by his driver in transporting eight ivory tusks. In dismissing the appeal that court observed that since driver was his employee, the appellant was vicariously liable for the acts of his driver.

Issues for determination

13. I have considered the evidence of the appellant and the submissions of both counsel including the authorities cited by both counsel. As a result, I find the following to be the issues for consideration.

1) Whether the trial court complied with the provisions of section 389A of the Criminal Procedure Code.

2) Which are the appropriate orders to be made?

Issue 1.

14. I find from the unchallenged evidence of the appellant that he was hospitalized at Kenyatta National Hospital when the offence that gave rise to the order of forfeiture was committed following a road accident. I also find from his unchallenged evidence that his subject motor vehicle registration No. KCDL 6321 pick-up was co-owned with Equity Bank Ltd, a matter in respect of which he produced a copy of the log book as exhibit Exh P 1. He testified that the original log book was with the said bank. Exhibit P 1 supports his evidence in that regard.

15. In the light of the foregoing evidence, it was incumbent upon the trial court to serve Equity Bank Ltd with a notice to show cause why the vehicle should not be forfeited, since they co-owned the said subject motor vehicle. The duty to do so arises by virtue of the following provisions of the section 389A (1) and (2) of the Criminal Procedure Code, which provide as follows:

“389A (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 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 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.”

16. It is equally clearly that Equity Bank Ltd had an interest in the subject motor vehicle and was therefore condemned unheard. The trial court denied itself the opportunity of knowing the extent of the interest of the said bank by failing to serve the bank with the aforesaid notice.

17. Furthermore, the State is forbidden by article 40 (3) of the 2010 Constitution from depriving any person of property of any description, or of any interest in property except as authorized by law. In the instant case the State through the court deprived the bank of its property without the due process of the law.

18. In view of the foregoing, it is clear that the trial was defective. It therefore follows that the appellant's appeal succeeds with the result that the order of forfeiture is hereby set aside.

19. In the light of the foregoing finding it is unnecessary to consider the other grounds of appeal.

Issue 2

20. The only point for consideration is whether I should order for a re-trial of the forfeiture proceedings by virtue of this court's inherent powers as a superior court of record, which jurisdiction is possessed by this court independently of any statute. See *Kenya Bus Services Ltd v Attorney General & Others [2005]1 EA 111*, in which that court stated in part that its inherent powers are not derived from any statute, but are derived from the character or nature of the court. Where in appellate proceedings in which a person has been acquitted this court is statutorily authorized by section 354 (3) (a) (i) of the Criminal Procedure Code to order for a re-trial, where the interests of justice demand; which provisions of the law are relevant in the instant matter. I am guided by those provisions.

21. In the premises, I find that the interests of justice demand that a re-trial of the matter be had before another magistrate of competent jurisdiction other than the one who dealt with this matter (Hon. W. Juma). A re-trial of the matter is hereby ordered.

22. For the avoidance of doubt, the appellant and Equity Bank Ltd are entitled to participate in the re-trial proceedings with or without counsel.

Judgment signed, dated and delivered at **Narok** this **6th day of May 2020** in the absence of both counsel via posting through their E-mail address.

J. M. Bwonwong'a.

J U D G E

06/05/2020