REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 80 OF 2019

DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

FRANCIS OCHIENG ONYANGO.....RESPONDENT

(An appeal against the judgement, sentence and Order by Hon. T.M. Olando, Senior Resident Magistrate delivered on the 29th July 2019 in Siaya Principal Magistrate's Court Criminal Case No. 713 of 2019)

JUDGMENT

1. This is an appeal by the Director of Public Prosecutions, Siaya County Office against the judgment and sentence by Hon. T.M. Olando delivered on the 29th July 2019. The respondent faced six counts. He pleaded guilty and was convicted and sentenced in all the six counts. In count 1, the Respondent Francis Ochieng Onyango was charged with the offence of distributing alcoholic drinks in plastic bottles contrary to section 31(1) (2) (a) as read with section 31(3) of the Alcoholic Drinks Control Act no. 4 of 2010 the particulars being that on the 18th day of July 2019 at Siaya Township Location the Respondent while using motor vehicle Registration No. KCQ 723H he was found distributing various alcoholic drinks in plastic bottles.

2. In Count 2 the respondent was charged with being in possession of uncustomed goods contrary to section 200 (a) (i) (ii) as read with section 200 and section 213 of the East African Community Customs Management Act, 2004 the particulars being that on the 18th day of July 2019 at Siaya Township location together with his co-accused using motor vehicle Registration No. KCQ 723H the respondent was found in possession of 48 packets of super match king size cigarette valued at KShs2400 in contravention of the aforementioned Act.

3. In Count 3 the respondent was charged with being in possession of alcoholic drinks (chang'aa) contrary to section 27(1)(b) as read with section 27(4) of the Alcoholic Drinks Control Act No. 4 of 2010 the particulars being that on the 18th day of July 2019 at Siaya Township Location the respondent was found in possession of 685 litres of chang'aa having not been prepared in accordance with the aforementioned Act.

4. In Count 4 the respondent was charged with selling alcoholic drinks in plastic bottles contrary to section 31(2) as read with section 31(3) of the Alcoholic Drinks Act no. 4 of 2010 and the particulars being that on the 18th day of July 2019 at Siaya Township Location the respondent was found selling 192 pieces of Enjoy 200ml alcoholic drinks in plastic bottles to in contravention of the said Act.

5. In Count 5 the respondent was charged with being in possession of alcoholic drinks (chang'aa) contrary to section 27(1)(b) as read with section 27(4) of the Alcoholic Drinks Control Act no. 4 of 2010 the particulars of which are that on the 21st day of July 2019 at Siaya Township Location the respondent was found in possession of 340 litres of Alcoholic drinks having not been prepared in accordance with the Act.

6. In count 6, the Respondent was charged with being in possession of uncustomed goods contrary to section 200(a) (i)(ii) d(i) (iii) as read with section 210 and section 213 of the East African Community Customs Management Act 2004. The particulars of the offence are that on the 21st day of July, 2019 at Siaya Township location in Siaya Sub county within Siya County the Respondent was found in possession of 35kgs of MSL Sugar (SUKARI YA MAYUGE) valued at Kshs 2500 in contravention of the said African(sic) Community Customs Management ACT, 2004.

7. The respondent pleaded guilty on all 6 counts and considering his mitigation, the trial magistrate sentenced him as follows;

a) In Count 1 to pay for Ksh. 20,000 in default to serve one year in prison

b) In Count 2 to pay a fine of Ksh. 2400 in default to serve one month in prison.

c) In Count 3 to pay fine of Ksh. 20,000/= in default to serve one year in prison.

d) In Count 4 to pay a fine of Ksh. 5000 in default to serve 6 months in prison and

e) In Count 5 to pay a fine of Ksh. 5000 in default to serve 6 months in prison.

8. The trial magistrate ordered that the sentences would run concurrently (where fine was not paid) and he made a further order, on application by the Respondent and on no objection by the Prosecutor Mr. Namasake, that motor vehicle KCQ 723H, used in committing the offence be released to the owner.

9. Aggrieved by ssentence passed and order for release of motor vehicle KCQ 723H to the owner thereof, Respondent, Office of the Director of Public Prosecution through Mr. Okachi filed a petition of appeal out of time with leave of court setting out the following Grounds of Appeal:

a) The learned magistrate erred in law and fact by meting out lenient sentences to all counts spelled out in the charge sheet (i-vi), and the same should be enhanced.

b) The learned magistrate erred in law and fact by meting out lenient sentences to all counts spelled out in the charge sheet (i-vi), without appreciating that the damage caused to society is immense.

c) The learned magistrate erred in law and fact by meting out lenient sentences to all counts spelled out in the charge sheet (i-vi), and failed to appreciate that Public interest supersedes personal interest and should be protected at all costs.

d) The learned magistrate erred in law and fact by not appreciating that the prosecution proved its case beyond any iota of doubt in all counts spelled out in the charge sheet (i-vi). Hence event the tool/vessel of the illegal trade had to be forfeited to the state unless there was a satisfactory explanation by the owner of such a tool or vessel in this case motor vehicle registration number KCQ723H.

e) The learned magistrate erred in law and fact by requiring the prosecution to respond on whether they had an objection to the release of motor vehicle which question was misleading and misplaced as the discretion lay with the Court.

f) The learned magistrate erred in law and fact by misusing its discretion and thus arrived at a wrong decision of authorizing the aforesaid motor vehicle to be released.

Submissions

10. The appeal was canvassed by way of written submissions which were all filed via e mail owing to covid19 situation.

11. According to the appellant, in the submissions filed on 27th May 20202, section 27(1)(b) and 27(4) of the Alcoholic Drinks and Control Act of 2020 is very clear that a person who contravenes the aforesaid sections particularly regarding the penalty and punishment, is liable to a fine of two million shillings or an imprisonment term of five years or both.

12. Counsel for the Respondent submitted that even if there were mitigating factors which the trial magistrate could consider, which mitigating factors are not on record, the trial court took a blind eye on the aim and spirit of the Act by preferring a very lenient sentence that the Respondent considers to be a slap on the face of those who by all intends and purposes want to implement the law and ensure that the Act and the Rule of Law is observed.

13. It was further submitted that the Act does not look at the quantity but mere contravention of the Act and that although the court is not bound to give maximum sentence but it must punish the offender in accordance with the law. This court was urged to quash the sentences of lenient fines imposed on the Respondent and proceed to sentence the Respondent in accordance with the spirit and letter of the law.

14. On the trial magistrate's failure to forfeit the vehicle used in the commission of the offence, the Respondent's counsel submitted that section 34(a) and (b) of the Alcoholic Drinks Control Act No. 4 of 2010 provides that the court may order for forfeiture of any vessel containing alcoholic drinks together with all drinks, and that the court is given discretionary powers which was abused by the trial court as it only ordered for forfeiture of the alcoholic drinks and not the vehicle which was used to carry the drinks. This court was urged to set aside and quash the order releasing the motor vehicle registration number KCQ 723H to its owner as the order frustrates the aim and spirit of the laws governing the control, supply and handling of the goods involved. It was submitted that at most the trial court should have ordered for surrender of the offending motor vehicle to the Commissioner of Customs, KRA. He urged the court to set aside the order and order for forfeiture of the vehicle as past decisions have caused more confusion, citing five decisions

15. The Respondent filed written submissions on 20th May 2020 through his counsel Mr Ochanyo, citing statutory provisions. Counsel submitted that before the conviction and sentence, the prosecution produced all the exhibits in the case but that they never produced the Motor Vehicle KCQ 723H as an exhibit and that further, upon application by the Respondent for release of the said motor vehicle, the prosecutor never objected to the release. It was also submitted that there was no evidence to show that the motor vehicle belonged to the Respondent.

16. On the alleged lenient sentences, Mr. Ochanyo submitted that in count one, under section 32(3) of the Alcoholic Drinks Control Act, the maximum sentence is a fine not exceeding fifty thousand Kenya shillings and in default the convict to serve a prison term not exceeding six months or to both; in count two, under section 200 (d) of the East African Community Customs Management Act, upon conviction, the

offender is liable to imprisonment for a term not exceeding five years or to a fine equal to fifty percent of the dutiable goods involved or to both.; on the goods which are liable for forfeiture, the provisions of section 210 of the EACCMA were cited in extensor as read with sections 213 of the same Act on the procedure for forfeiture a; on the counts under section 27 (1) (b) and 27(4) of the Alcoholic Drinks Control Act, counsel for the Respondent submitted that the penalty under the section upon conviction is a fine not exceeding two million or a prison term not exceeding five years or to both.

17. It was submitted that if the Respondent would not have been able to raise the total fine then he would have served a total of three years and 7 months in prison as the sentences were to run consecutively.

18. On the count under section 200 (a)(i)(ii) d(i) (ii) of the EACCMA of 2004, it was submitted that the section provides for imprisonment term not exceeding five years or to a fine equal to fifty percent of the dutiable value of the goods involved, or both.it was therefore submitted that from the trial court record, there is no evidence that the prosecution guided the court on what the dutiable value was so as to enable the court sentence the accused/Respondent herein properly. Counsel submitted that in view of the above, the sentences imposed in comparison to the maximums provided by law were not lenient.

19. On section 34 of the Alcoholic Drinks Act, it was submitted that the section refers to a situation where an accused person is charged with and convicted for the offence relating to breach of licenses and that in the instant case, the Respondent was not charged with the offence of breach of licenses hence the question of forfeiture under that section does not arise or apply to the instant case.

20. Concerning the forfeiture under the EACCMA, it was submitted that the procedure for forfeiture is provided for under section 213 of the said Act and that in the instant case as the procedure for forfeiture was not followed, the trial court or this court cannot order for forfeiture of the motor vehicle that was ferrying the said uncustomed goods.

21. The Respondent's counsel therefore submitted urging this court to find the appeal bereft of merit and dismiss it.

Determination

22. I have considered the grounds of appeal, the plea of guilty on the trial court record, the submissions for and against the appeal and authorities cited. In my humble view, the issues for determination in this appeal are:

> ***1. Whether the sentences imposed on the Respondent by the trial court were too lenient in the circumstances***
>
> ***2. Whether the trial magistrate should have ordered for the forfeiture of the motor vehicle Registration No. KCQ723H.***

23. In this appeal, it is clear that the appellant ODPP is only aggrieved by the sentences imposed on the Respondent and the order for release of the Motor Vehicle Registration NO. KCQ 723H.

24. The Appellant laments that the sentences meted out on the respondent is too lenient and further that the trial magistrate misdirected Mr. Namasake, Prosecution Counsel for the appellant in the trial court into allowing the release of motor vehicle registration no. KCQ 723H which had been impounded.

25. Since the appellant is only appealing against sentence, it is important to set out the circumstances under which an appellate court interferes with sentence. The principles guiding interference with sentencing by the appellate Court were properly set out in **S vs. Malgas 2001 (1) SACR 469 (SCA)** at para 12 where it was held that:

> ***"A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court…However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate."***

26. Similarly, in **Mokela vs. The State (135/11) [2011] ZASCA 166**, the Supreme Court of South Africa held that:

> ***"It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."***

27. The predecessor of the Court of Appeal in the case of **Ogolla s/o Owuor vs. Republic, [1954] EACA 270**, pronounced itself on this issue as follows:-

> ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."***

28. In **Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003** the Court of Appeal stated:

"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)."

29. The Court of Appeal, on its part, in **Bernard Kimani Gacheru vs. Republic [2002] eKLR** restated that:

"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, 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 some wrong material, or acted on a 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."

30. In this case, charges brought against the respondent were brought under the following laws:

Count 1: Section 27 of the Alcoholic Drinks Control Act which provides:

"(1) No person shall—

(a) Manufacture, import or distribute; or

(b) Possess, an alcoholic drink that does not conform to the requirements of this Act.

(2) Subsection (1) shall not apply to a person who—

(a) Is authorized under this Act to be in possession of the alcoholic drink; or

(b) Has possession of the alcoholic drink in a premises licensed under this Act.

***(3) The manufacture or distillation of all spirituous liquor prior to this Act referred to as Chang'aa shall conform to the prescribed standards or the requirements of* this Act.**

(4) ***A person who contravenes the provisions of this section commits an offence and shall be liable to a fine not exceeding two million shillings, or to imprisonment for a term not exceeding five years, or to both."***

31. Count 1 under Section 31 of the same Act provides:

"(1) No person shall sell, manufacture, pack or distribute an alcoholic drink in sachets or such other form as may be prescribed.

(2) Notwithstanding the provisions of subsection (1)—

a) no person shall manufacture, pack, distribute or sell an alcoholic drink in a container of less than 250 millilitre;

b) the alcoholic drink previously known as chang'aa or any other distilled alcoholic drink shall only be manufactured, packed, sold or distributed in glass or PET (polyethylene terephthalate) bottles or metallic containers of the kind specified in paragraph (a).

(3) ***A person who contravenes this section commits an offence and shall be liable to a fine not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding six months, or to both."***

32. Count 3 under Section 200 (a) (i) and (ii) of the East African Community Customs Management Act provides:

"A person who—

(a) Imports or carries coastwise-

(i) any prohibited goods, whether or not the goods are unloaded; or

(ii) any restricted goods contrary to any condition regulating the importation or carriage coastwise of such goods, whether or not the goods are unloaded;.....

Commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine equal to fifty percent of the dutiable value of the goods involved, or both."

33. Under Section 213 of the East African Community Customs Management Act,

"213. (1) An officer or a police officer or an authorised public officer may seize and detain any aircraft, vessel, vehicle, goods, animal or other thing liable to forfeiture under this Act or which he or she has reasonable ground to believe is liable to forfeiture; and that aircraft, vessel, vehicle, goods animals or other thing may be seized and detained regardless of the fact that any prosecution for an offence under this Act which renders that thing liable to forfeiture has been, or is about to be instituted."

34. In my humble view, there is no material misdirection on the part of the trial magistrate to warrant this court to interfere with the sentence passed by the trial magistrate as there was no valuation of the duty due and payable disclosed.

35. Sentence being in the discretion of the trial magistrate, the prosecution cannot expect the court on appeal to impose a much harsher sentence especially where there was no evidence to demonstrate that the Respondent was a repeat offender.

36. In addition, this court is of the view that no right of appeal arises in favour of the prosecution where there is a conviction. Section 348A of the Criminal Procedure Code under which the DPP is granted a right of appeal in criminal trials, only applies to ***acquittal, order for refusal or dismissal of charge,*** and stipulates as follows:

"348A. Right of appeal against acquittal, order of refusal or order of dismissal

(1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.

(2) If the appeal under subsection (1) is successful, the High Court or Court of Appeal as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately. [Act No. 13 of 1967, s. 3, Act No. 12 of 2012, Sch, Act No. 19 of 2014, s. 19.]"

37. The trial subject of this appeal ended in a conviction of the respondent on his own plea of guilty on all the six counts reproduced hereinabove. It follows therefore that the ODPP is only aggrieved by the sentence imposed therefor against the respondent which is considered too lenient for the offences in the various charges. There being no "**acquittal, order of refusal or order of dismissal**", there is no right of appeal for the ODPP. The convicted person may, of course, appeal against the sentence imposed against him under section 347 of the Criminal Procedure Code.

38. It follows that where the ODPP is aggrieved by sentence, it could only apply for revision of sentence and not appeal against sentence imposed.

39. Section 362 of the CPC grants the High Court revisionary jurisdiction as follows:

"362. Power of 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."

Under section 364 of the CPC the High has the powers of revision as follows:

"364. Powers of 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—

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

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

(c) in proceedings under section 203 or 296(2) of the Penal Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.

(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 defence:

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.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed. [Act No. 10 of 1970, Sch., Act No. 19 of 2014, s. 20, Act No. 25 of 2015, Sch.] "

40. Subsections (4) and (5) of section 364 clearly imply that the procedure for revision by a prosecutor (DPP) as a party to the criminal trial is only available for review of sentence and other order, because - (a) the court cannot substitute a conviction where there has been an acquittal as it is entitled to do on appeal under section 348A (2) of the CPC, and (b) where appeal lies, revision is not available ***"at the insistence of the party who could have appealed".*** No appeal lies in this case, and the ODPP may properly have applied for revision of the sentence.

41. Therefore, assuming this was a revision and not an appeal, the court would consider the application for revision under section 365 of the Criminal Procedure Code which provides:

"365. Discretion of court as to hearing parties

No party has a right to be heard either personally or by an advocate before the High Court when exercising its powers of revision:

Provided that the court may, when exercising those powers, hear any party either personally or by an advocate, and nothing in this section shall affect section 364(2)."

42. Under section 364(2), no order adverse to an accused may be made against him without hearing him, save where the trial court has "***failed to pass a sentence which it was required to pass under the written law creating the offence concerned.***"

43. Having heard both the appellant and the Respondent on the sentences meted out, cannot persuaded that the trial magistrate failed to pass a sentence which it was required to pass under the relevant law creating the various offences with which the respondent was charged, as the trial magistrate exercised discretion and fined the respondent, which fines were within the limits provided by law. It follows therefore that the trial magistrate committed no error of law or fact in imposing the sentences that he did, upon the respondent. I find no merit in the ground of appeal against sentence. I accordingly dismiss the ground.

44. Regarding the release of the motor vehicle registration No. KCQ 723H, the established practice in our courts is that a motor vehicle recovered from an offender and detained by the police would normally be photographed and released to the owner on condition that it would be availed whenever required by the court as was stated by **Muchemi J** in **R v John Nganga Mbugua [2014] eKLR.**

45. In the instant case the respondent was arrested using the stated motor vehicle for transportation of the alcoholic drinks and the uncustomed goods as stated in the charge sheet. The motor vehicle was detained by the police and it was therefore expected that upon the respondent pleading guilty to the charges, and facts being read to him, exhibits including the subject motor vehicle used in the conveyance of the offensive alcoholic drinks and uncustomed goods would be produced as exhibits.

46. Regrettably, the motor vehicle was never produced as an exhibit as it is not among exhibits 1-8 produced and therefore it follows that the same could only be held during the pendency of the case.

47. The prosecution having failed to produce Motor vehicle Registration **No. KCQ 723 H** as an exhibit, after the Respondent pleaded guilty to the charges against him and facts were read out to him, and all other exhibits produced 1-8, and the Respondent having written a letter to court asking for release of his motor vehicle and Mr Namasake Prosecutor having stated that he had no objection to its production, I find no fault on the part of the trial court making an order on 31/7/2019 for the release of the motor vehicle. I note that Mr. Namasake, then Prosecution Counsel for the appellant in the trial court stated that ***he did not object to the release of the motor vehicle by the trial court.***

48. In view of the above situation, I find no misdirection by the trial magistrate regarding the order of release of the subject motor vehicle. The prosecution should blame itself for not producing the vehicle No. **KCQ 723 H** used as a conduit as an exhibit and for conceding to its release without any conditions.

49. Further to the above it is noteworthy that Criminal forfeiture, which refers to the court's power to confiscate the accused person's property as part of sentence, as a form of punishment, ought to take into account the principle of proportionality. Sentences scaled to the gravity of the offence are fairer than punishments which are not proportionate to the crime. It is a generally acceptable principle in criminal

law that punishment must fit the crime. (See ***Andrew von Hirsch C proportionality in the philosophy of punishment 1992 16 Crime and justice 55,56)***

50. It is noteworthy that the grant or denial of forfeiture petition by the state rests within the discretion of the trial court. In my view it has to be determined and supported by substantial evidence to establish the ownership of the property by creating a nexus to the charge. In the instant case, apart from the charge mentioning that the Respondent was using the named motor vehicle for transporting the offensive goods, the prosecution never produced the said motor vehicle Registration number KCQ 723H Probox as an exhibit.

51. In **Peter Igiria Nyambura v Director of Public Prosecutions [2018] eKLR** it was held:

> ***"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."***

52. Taking all the above into consideration, it is my humble view that the appellant herein has not satisfied this court as to why the motor vehicle registration No. KCQ 723H should be forfeited to the state. This is so because there is no automatic forfeiture of the vehicle. The appellant needed to proof that the appellant was in breach of licence as stipulated in section 34 of the Act. The Respondent was not charged with breach of licence. Section 34 provides:

> **Breach of licence-**
>
> ***Any person who sells an alcoholic drink or offers or exposes it for sale or who bottles an alcoholic drink except under and in accordance with, and on such premises as may be specified in a licence issued in that behalf under this Act commits an offence and is liable—***
>
> ***a) for a first offence, to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding nine months, or to both;***
>
> ***b) for a second or subsequent offence, to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding one year, or to both, and in addition to any penalty imposed under paragraph (a) or (b), the court may order, the forfeiture of all alcoholic drinks found in the possession, custody or control of the person convicted, together with the vessels containing the alcoholic drink.***

53. In other words, for the punishment of forfeiture to be imposed, under the Alcoholic Drinks Control Act, it was necessary that the respondent be charged and be found guilty of the offence of breach of licence. It follows that the trial magistrate had no jurisdiction to order for forfeiture of the subject motor vehicle, on his own motion without proof of breach of licence.

54. However, under sections 210 and 213 of the EACCM, Act, a procedure for forfeiture of goods where goods are liable for forfeiture is clearly spelt out and such forfeiture is to be undertaken by the Commissioner for customs and not by the court.

55. Therefore, if the appellant wishes to have the motor vehicle forfeited as it is in custody of the police, they are at liberty to advise the Customs Department to follow the procedure laid down in the law and not to invoke the discretion of this court as the Respondent was not charged with the offence of Breach of licence under section 34 of the Alcoholic Drinks Control Act, and neither does this court have jurisdiction to forfeit the vehicle where the law specifically provides that it is the Commissioner of Customs to initiate such administrative process for forfeiture.

56. For the above reasons, I find this appeal not merited. The same is hereby dismissed.

Orders accordingly.

Dated Signed and Delivered at Siaya this 20th Day of July 2020

R.E. ABURILI

JUDGE

In the presence of:

Mr. Okachi SPPC for the Appellant

Mr. Ochanyo counsel for the Respondent

Respondent present Francis Ochieng Onyango

CA: Ishmael and Modestar