



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PETITION NO. 34 OF 2019

ABDIAZIZ MOHAMMED WARSAME.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE KENYA REVENUE AUTHORITY.....2ND RESPONDENT

R U L I N G

The petitioner filed an application and petition on 29th August 2019 seeking orders that a conservatory order issue to stay the execution of the order made on 30th July 2019 by Hon Emily Kigen forfeiting to the commissioner of Kenya Revenue Authority for disposal the super match cigarettes produced as exhibits in Eldoret CMCCC No. 3609 of 2018 in the case of – R v Elisha Korir, pending the hearing and determination of the petition.

PETITIONER'S CASE

The petitioners' advocate submitted that he had a prima facie case. He was denied an opportunity to be heard when the order of forfeiture was made in Criminal Case No. 36091 of 2019. The order of the court made on 30th July 2019 shows that the magistrate directed the forfeiture of supermatch cigarettes worth kshs. 34,950,000/- to KRA. The order was made without according the petitioner a hearing and it was clear he had an interest in the matter. This was a breach of article 50 of the constitution.

The forfeiture was done under the EA Community Customs Management Act of 2004. The law only has a penalty and no procedure and guidelines on how it should be imposed. In Kenya, there cannot be exercise of duty authority in a criminal case without guiding principles on how it should be exercised. Even without guidelines the magistrate should have proceeded under section 389A of the CPC to safeguard the right to a fair hearing.

The court was duty bound to serve a notice inviting a person with interest to show cause. If the petitioner was not known, the court should have placed a sizeable notice in the newspaper before exercising the order of forfeiture. They relied on the case of Mwazi v R (1989). The court held that forfeiture being a penalty cannot be carried out without a hearing.

There was discrimination and breach of article 27 of the constitution of Kenya. The owner of the vehicle, the subject of the charge and whose name has never appeared in the proceedings was served with a notice to show cause why his vehicle ought not to be forfeited. The petitioner was treated differently and both were subjects of the same criminal proceedings. Article 159 was breached.

The petitioner requested the consideration of invalidity of certain provisions of the law. Section 215 of the EA Community Customs Management Act introduces the mandatory penalty of forfeiture. Article 40 is against the mandatory deprivation of property. The constitution provides for the right to be heard and to own property. section 217 of the EA Customs Management Act allows the condemning of items upon conviction which makes an owner who is not a party to the case to be condemned unheard against article 159 of the constitution.

The 6th schedule of the constitutional transition provisions is to the effect that laws in force before the constitution must comply with the constitution. Forfeiture before hearing is unconstitutional.

The petitioners' advocate further submitted that they urged the court to exercise supervisory jurisdiction over the CM's court in Eldoret by quashing the order. He invited the court to declare section 215(1) and 212(1) of the EA Community Customs Management Act unconstitutional. They affect the administration of justice in regard to article 159 of the constitution.

He prayed for costs and damages for breach of rights.

RESPONDENT'S CASE

In response to the petition, the respondent's advocates submitted that the accused was tried and convicted in case No. 3609/2018. He was fined kshs. 50,000/- in default 12 months imprisonment for conveying uncustomed goods contrary to section 199B and 199(m) of the EA Community Customs Management Act of 2004. The procedure is well established in sections 215 and 217 of the Act. It provides for automatic forfeiture of goods in question. There is no requirement for hearing in forfeiture.

Section 214 of the said Act provides that any owner ought to issue a notice to KRA once goods have been seized. The petitioner did not issue a notice but sent letters allegedly from Sudan. If he had issued a notice he would have been given a hearing.

Under the Mutual Legal Assistance Act No. 36 of 2011, section 33 and 46 he failed to follow procedure to make the documents allegedly from South Sudan usable by KRA. The petitioner should have moved in as a defence witness. The defence counsel made an application to reopen the defence case after it was closed so as to introduce a witness claiming to be the owner of the goods. It was not the petitioner; it was a person known as John Patch. The application was dismissed.

Section 217 is not unconstitutional. Ownership of the goods is not established. The rights claimed under article 40 are not proven. The court heard the case in accordance with article 159 of the constitution. The court was urged to apply article 46 of the constitution as this is a public interest matter. The petition should be dismissed. He relied on the case of Hassan Shaban Mshana – No. 8 of 2014.

The advocate for the 2nd respondent associated himself with the submissions of the 1st respondent and relied on the replying affidavit. He averred that they did not have any document lodged in the system that allowed for the petitioner to move the goods meant for export back to Kenya. One John Patch claimed ownership in the lower court. There is no evidence that the petitioner is the owner of the goods in question. The vessel is treated under section 211 and is treated differently from actual goods. The goods are handled under section 215 and 217 of the Act.

They relied on section 387A of the criminal procedure code on the release of forfeited goods to KRA. This applies where there is no substantive law providing for forfeiture.

ISSUES FOR DETERMINATION

- a) Whether the petitioner's rights to property and to a fair hearing were violated
- b) Whether the provisions of section 215(1) and 217(1) of the EA Community Customs Management Act are unconstitutional

WHETHER THE PETITIONERS' RIGHTS TO PROPERTY AND A FAIR HEARING WERE VIOLATED

In the case of **John Mining Temoi & another v Governor of Bungoma County & 17 others [2014] eKLR** the court held at paragraph 81 that;

As a basic minimum, the Petitioners are required to not only cite the provisions of the Constitution which have been violated but also the manner in which they have been violated with regard to them. See the case of Anarita Karimi Njeru (1976-80) 1 KLR 1272 and Trusted Society of Human Rights Alliance -v- Attorney General & Others High Court Petition No. 229 of 2012. In demonstrating the manner in which there has been a violation of their rights or of the Constitution, the Petitioners should present before the court evidence or a factual basis on which the court can make a determination whether or not there has been a violation.

Section 214 of the EA Community Customs Management Act provides;

Where any thing has been seized under this Act, then, on seizure, unless such thing was seized in the presence of the owner of the thing, or, in the case of any aircraft or vessel, of the master thereof, the officer effecting the seizure shall, within one month of the seizure, give notice in writing of the seizure and of the reasons to the owner or, in the case of any aircraft or vessel, to the master:

For a right to be violated the petitioner must prove that the right existed in the first place. The right to property was not proven as the petitioner did not prove that he had ownership of the goods. Consequently, the right to be heard was not proven as he had not established that he was the owner of the goods. Therefore, there was no way a party who was not shown to be the owner of the goods could have been heard by the court. In the premises, the petitioners' rights to a fair hearing and to property were not violated.

WHETHER THE PROVISIONS OF SECTION 215(1) AND 217(1) OF THE EA COMMUNITY CUSTOMS MANAGEMENT ACT ARE UNCONSTITUTIONAL

Section 215(1) of the Act provides;

(1) Where any person is prosecuted for an offence under this Act and any thing is liable to forfeiture by reason of the commission of the offence, then the conviction of the person for the offence shall, without further order, have effect as the condemnation of the thing.

Section 217(1) of the Act provides;

(1) Where any thing has been seized under this Act, as being liable to forfeiture, then the condemnation of the thing shall in no way be affected by the fact that any owner of the thing was in no way concerned with the act which rendered the thing liable to forfeiture.

The sections provide for forfeiture of goods that are part of an illegal process. In my view the school of thought behind the condemnation of seized goods is to avoid accruing benefit to individuals from illegal or fraudulent processes. The petitioner, even if proven to be the owner of the goods, cannot be allowed to benefit from an illegal action i.e. conveying of uncustomed goods.

Given that he did not establish ownership and the accused was tried and convicted, there is no unconstitutionality in the sections. Further, there was no discrimination as the Act treats vessels and actual goods differently. Section 211 gives the provisions on forfeiture of the vessel as a separate issue.

The said sections have not been proven unconstitutional. In the premises the petition fails and is dismissed with costs to the 2nd Respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 3RD day of DECEMBER, 2019

In the presence of:

Mr. Oburu holding brief for Mr. Kigamwa for the Petitioner

Mr. Chacha holding brief for Miss Opiyo for KRA and appearing for State.

Komen – Court Assistant