



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 68 OF 2016

GLADYS WAMBUI MICHUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Ruling and Order in Kitui Chief Magistrate's Court Traffic Case No. 904 of 2016 by Hon M.Murage (CM) on 18/10/16)

J U D G M E N T

1. This is an appeal that emanates from an order directing forfeiture of motor vehicle Registration No. **KCG 258V, Hino (motor vehicle) Truck to Kenya Forest Services.**

2. On the 1st day of **September, 2016 Luice Musyoka Munyoki** was arrested in **PCR No. 904 of 2014** and charged with the offence of transporting forest produce namely charcoal without a forest movement permit as required by the **Forest Act, No. 7 of 2005**. The motor vehicle registration No. **KCG 258V** make Hino had carried some 109 bags of charcoal.

3. At the outset, the accused admitted the charge and was convicted. He was given an opportunity of addressing the court in mitigation where he stated thus:-

“I seek leniency. I wanted to raise money. I had no permit.”

Consequently, a sentence was passed. Per the records the prosecutor made an application for the motor vehicle to be detained at the police station for the owner to show cause why it should not be forfeited to State within 14 days. The court ordered thus:-

“Charcoal is forfeited to the state. Motor vehicle remanded at Kitui Police Station”.

4. Subsequently on the 20th day of **September, 2016 Gladys Wambui Muchoki**, the Appellant filed a **Misc. Application No. 112 of 2016** seeking release of the motor vehicle. An order dated the 18th day of **October, 2016** was made in **Kitui Criminal case No. 904 of 2016** forfeiting the motor vehicle to the State through Kenya Forest Services and the order was to apply to **Misc. Application No. 112 of 2016**.

5. Aggrieved by the order of the court the Appellant herein appealed on grounds that:

- ◆The learned trial magistrate erred and misdirected herself in law and fact when she ordered forfeiture of the Appellant's lorry registration No. **KCG 238V** by considering irrelevant factors;
- ◆ the state had conceded that the Appellant had given a reasonable explanation to merit release of the motor vehicle;
- ◆ the findings of the learned magistrate were based on the fault of the Appellant's son who was an adult of independent criminal responsibility;
- ◆the fact that the motor vehicle was on loan from **Faulu Micro Finance Bank** and the only source of livelihood of the Appellant was not considered and hence an infringement on the economic and social rights of the Appellant contrary to **Article 43** of the **Constitution of Kenya 2010**.

6. The appeal was canvassed by way of written submissions. **Mr. Mwalimu** learned Counsel for the Appellant urged that the State had

conceded to the release of the motor vehicle because facts obtaining were clear in that the Appellant was not aware that the accused was transporting charcoal with the lorry when he was arrested. That the Appellant avoided ownership of the subject motor vehicle confirming that it did not belong to the accused. That the Appellant averred that she had allowed her son to use the vehicle for lawful business contrary to the sentiments of the court that she had the responsibility to ensure the motor vehicle was not used to commit crimes.

7. Further, it is submitted that the subject motor vehicle was on loan therefore when the court ordered its forfeiture on the fault of a third party, this was tantamount to infringing on the social and economic rights of the Appellant contrary to **Article 43 of the Constitution of Kenya 2010**.

8. The Appellant relied on the case of *Mwasi vs Republic [1989] 544* where it was held that:-

“Forfeiture is a penalty; however, it can only be treated as a penalty where the evidence clearly shows that the property forfeited belongs to the accused.”

And **Nakuru Judicial Review Case No. 53 of 2012 (Republic vs. Principal Magistrate at Eldama Ravine & 3 Others (2014 eKLR)** where **Emukule J.** in quashing an order of forfeiture stated that:-

“the questions are in tandem with the principle that forfeiture is a punishment or penalty against the offender as the owner of the property.”

9. He called upon the court to find that the accused was sufficiently punished for his actions and allow the appeal by directing the release of the motor vehicle to the Appellant.

10. The state through learned prosecuting counsel **Mr. Mamba** submitted that the court was seized of discretionary powers granted under **Section 55(1)(c)** of the **Forest Act** and **Section 177 and 389A** of the **Criminal Procedure Code**.

11. I have duly considered rival submissions by both counsels.

12. This being a first appellate court I do remind myself of the duty of re-considering what transpired in the lower court and to come up with my own conclusions.

13. The consequence of a person being convicted for the offence of removing/transporting forest produce, namely charcoal is provided for in **Section 55 of the Forest Act No. 7 of 2005** that provide thus:-

“(1) Where a person is convicted of an offence of damaging, injuring or removing forest produce from any forest, 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 forest produce be removed, and any 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 repairing the damage caused to biodiversity as a result of the activities complained of.

(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, huts or crops shall be deemed to be the property of the State, local authority or forest owner, as the case may be, and may be disposed of as the State, local authority or 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.”

From the aforesaid provisions of law the trial court is seized of the discretion to deal with the person who contravenes the law in that respect.

14. In addition to the fine imposed the individual could be ordered to compensate the forest owner. If the person was an agent or an employee of another, that other person could be ordered to compensate the owner of the forest. It is further provided that the vessel/motor vehicle used in the commission of the offence could be forfeited to the service. The learned trial magistrate did exercised her discretionary powers.

15. The question to be determined is whether she acted in accordance with the law?

16. In the instant case I would say that forfeiture is the loss of any property without compensation as a result of a punishment for the prohibited activity that was done which was criminal in nature.

17. The procedure of forfeiting things is provided for in **Section 389A of Criminal Procedure Code** that states as follows:-

“(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.”

18. After **Luice Musyoka Munyoki** who was in control of the motor vehicle was convicted the prosecutor made an application to this effect and the record reads thus:-

“prosecutor – May motor vehicle retained at Kitui Police (sic) for the owner to show cause why it should not be forfeited within 14 days.

M. Murage

Chief Magistrate

Order – charcoal is forfeited to the state. Motor vehicle remanded at Kitui Police.

M. Murage

Chief Magistrate

16/9/16

18/10/16

Before –Mrs Murage

Prosecutor – Mr.Wanjala

Court clerk – Collins

Order – motor vehicle herein KCG 258V is forfeited to the state through Kenya Forest Service per the order in Misc Application 112/16

M. Murage

Chief Magistrate

16/9/16.”

19. Although the prosecuting officer made an application that should have prompted the learned trial magistrate to comply with the provisions of **Section 389A** of the **Criminal Procedure Code** as the **Forest Act, 2005** does not provide the procedure through which forfeiture could be effected; she did not cause any notice to be served on the person believed to be the owner of the motor vehicle.

20. As a result of what transpired, the Appellant herein having not been a party to **Criminal Case No. 904 of 2016** filed a **Misc. Application No. 112 of 2016** seeking release of the motor vehicle in her capacity as the owner. In her affidavit in support of the application she deponed that she co-owned the motor vehicle with **Faulu Microfinance Bank Limited**. She annexed to the affidavit evidence of an application for the registration and licence of the motor vehicle in her name and that of **Faulu Microfinance Bank Limited** and a vehicle inspection report for the vehicle that gave the owner’s name as Truck World. The application was unopposed by the State. The Respondent stated that the applicant had ownership documents. Therefore he did not oppose the application.

In a ruling dated the **18th** day of **October, 2015**, the learned trial magistrate upheld what is provided in **Section 55(c)** of the **Forest Act** and went on to state thus:-

“...it was the responsibility of the applicant to make sure the motor vehicle not used to commit crimes. The motor vehicle was with her son. She has nothing to show not tell the court what transport business she had allowed her son to do. She has not given a satisfactory reason why the motor vehicle should not be forfeited. I consequently reject her application and order that the motor vehicle be forfeited to the Kenya Forest Service. This order will apply in Criminal 904/2016.”

21. In her application the Appellant stated that the motor vehicle was with her son who was doing charcoal business and she only learnt of it when the arrest was effected.

22. In his mitigation the offender started thus:-

“I seek leniency. I wanted to raise money. I had no permit of the charcoal.”

23. From the finding of the learned trial magistrate it can be interpreted that the court was satisfied that the offender was an employee/agent of the Appellant but did not believe that she was not aware of his engagement in the transport business of transporting the forest produce without a licence or permit. In other words the court believed that the offence was due to her default.

24. Had the state filed a replying affidavit to rebut the averments of the Appellant in the lower court, it would be discerned if indeed the Appellant had authorised the son/agent/employee to carry the illegal forest produce. Otherwise there was no proof that the motor vehicle was used to perpetuate a criminal activity following her negligence or default.

25. By forfeiting the motor vehicle to the Kenya Forest Service, the learned magistrate exercised the discretion bestowed upon her by the law following reasons that she gave, but this was a case where she should have considered acting pursuant to the provisions of **Section 55(1)(b)** of the **Forest Act**. Instead of forfeiting this motor vehicle, she should have penalized the Appellant by ordering her to compensate the Forest owner by paying the value of the Forest produce.

26. From the foregoing, I allow the appeal. The charge sheet is silent on the value of the forest produce. Therefore I shall not make an order of compensation. In the premises I hereby quash the order forfeiting the subject motor vehicle registration Number **KCG 238V** to the **Kenya Forest Service**. Accordingly it shall be released to the Appellant.

27. It is so ordered.

Dated, Signed and Delivered at Kitui this 12th day of November, 2018.

L.N. MUTENDE

JUDGE