



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

MISC. CR. APPEAL NO. 59 OF 2015

ADEN ISSAK IBRAHIM APPLICANT

V E R S U S

REPUBLIC..... RESPONDENT

RULING

The proceedings before this court were commenced through a written request for review filed in court on 16th December 2015, by C. K. Nzili and Company Advocates on behalf of Aden Issak Ibrahim the owner of the forfeited goods which were being transported by motor vehicle registration No. KCC 143F Mitsubishi Fusso lorry.

The review of the magistrate's court orders in Garissa Chief Magistrate Criminal Case No. 1207 of 2015 was sought, firstly, on the ground that Aden Issak Ibrahim was not given an opportunity to be heard before the forfeiture and condemnation order was made. Secondly, that no notice to show cause was issued to the owner why the goods should not be forfeited. Thirdly, that the goods were not produced in court as an exhibit before the court. Fourthly, that the order was unconstitutional.

It was thus requested that this court makes the following orders:-

- (a) This court be pleased to review, set aside, and quash the forfeiture order.***
- (b) That the honourable court directs the goods to be released to the applicant.***
- (c) Any other order in favour of the applicant.***

The request was served and heard inter parties. Mr. Nzili for the applicant submitted that the owner of the luggage had brought the application because his goods were forfeited and condemned to be destroyed by the learned magistrate, though the owner of the goods was not a party to the proceedings. Counsel submitted that the court merely noted that the goods were from Ethiopia and made an order for their destruction, while it was not clear whether any notice was issued to the owner before the goods were ordered to be destroyed.

Counsel submitted further that though the charge was for conveying uncustomed goods Contrary to Section 185 of the Customs and Exercise Acts, the provisions of that Act were subject to the Constitution. According to counsel the Constitution envisaged that somebody's property could not be adversely affected by an order of a court, without the owner being given a chance to be heard. Counsel submitted that since the owner of the goods was not an accused person in the trial court should have applied the provisions of Section 389A of the same Criminal Procedure Code. Counsel argued that this court should thus exercise its powers in revision under section 362 of the Criminal Procedure Code.

Counsel relied on a number of cases including case of ***Kamau Muchiri -vs- Republic 1990 eKLR***, and ***Roy Horrious Limited -vs- AG and 3 others 2014 eKLR*** as well as a case of ***Peter Nakitare -vs- Republic 2008 eKLR*** and lastly, the case of ***R -VS- Yator and 2 others 2015 eKLR***.

Counsel emphasized that those charged with the offence herein were merely a driver and turn boy of the transport lorry.

Mr. Wanyonyi for the State submitted that the State did not oppose the application, as the applicant was not an accused person at the trial. Counsel submitted that the people who were accused before the trial magistrate, pleaded guilty and it was the duty of the magistrate to enquire regarding ownership of the goods, as he had a right to be heard before making of forfeiture orders. Counsel emphasized that in line with the decision or reasoning in the case of ***Kamau Muchiri -vs- Republic(above)***, it was the duty of the trial court to invoke section 389A of the Criminal Procedure Code (cap.75) to call the owner of the goods to show cause. According to counsel, the forfeiture order herein was unlawful.

I have considered this matter and submissions on both sides.

The goods herein were forfeited following a plea of guilty by the two accused in a case of transporting uncustomed goods. The applicant, who was the owner of the goods, was not a party to the criminal proceedings.

The learned trial magistrate ordered forfeiture of the goods Under Section 196(c) of the customs and Exercise Act and also ordered that the said goods be destroyed. The court specifically ordered as follows:-

“Under section 196(c) of the Customs and Exercise Act, the goods produced herein as uncustomed good are liable to forfeiture. The motor vehicle found transporting the said goods is liable to forfeiture under Section 197(a) of the Act. I consequently order that the goods PEX1 and 2 are hereby forfeited and condemned Under Section 201(1) of the Act.

Under section 203 (1)(a), I order that the goods IEPEX 1 and 2 be destroyed within 14 days of today’s dates in the presence of the following persons – Commissioner in Charge KRA Office Garissa, a Representative of Neema, the Executive Officer of the honourable court, a Representative of Office of DPP, the County Commander. The court further orders that the exhibits shall remain in Garissa Police Station under security of County Commander until the date of destruction”.

From the above, it cannot be said as suggested by counsel for the applicant that the goods were not produced.

The applicant has come to this court through the revision procedure because not being a party to the criminal proceedings, he could not appeal. In my view the procedure adopted by the applicant is the correct procedure in trying to pursue his rights herein.

The question that has been put before this court is whether such forfeiture can be ordered without giving a hearing to the owner of the goods or lorry who might not be an accused person. I have been referred to a number of court cases by counsel for the applicant.

In the case of ***Bishar Hassan Mohammed -vs- Republic Machakos Cr. Appeal No. 135 of 2004*** the learned Judge highlighted what was relevant under Section 196 of the Customs and Exercise Acts regarding forfeiture of uncustomed goods as well of Section 201 of the same Act. The relevant part of Section 196 and 201 are in the following terms:-

“196. in addition to any other circumstances in which goods are liable to forfeiture in this Act, the following goods shall be liable for forfeiture,

a.....

b.....

c uncustomed goods

Section 201 states as follows:-

201 where a person is prosecuted for an offence under this Act and anything is liable to forfeiture by reason of commission of that offence, the conviction of that person of that offence shall, without further order, have effect of condemnation of that thing.....”

It is clear to me that both forfeiture and condemnation of goods follow the event after conviction of an accused person for transporting uncustomed goods.

As to whether the owner of the goods should be heard or be issued with a notice to show cause, in my view it depends on the circumstances of each particular case. Where it is clear to the court that the person charged is the owner of the goods there would be no reason or logic to issue an a notice to show cause. Where however it is not clear that the owner of the goods is the person charged, then there will be justification to issue a Notice to Show Cause why the goods should not be forfeited and condemned – see the case of ***KAMAU MUCHIRI & ANOTHER –vs- REPUBLIC (1990) eKLR***. In that event the provisions of section 389A of the Criminal Procedure Code (cap.75) would come into play. However if the accused do not give the identity and address of the owner, or are not willing to do so, the law takes its cause in that forfeiture and condemnation of the goods will follow the event of conviction.

In the present case the trial court did not enquire about the ownership of the goods in order to ascertain whether it should issue a Notice to Show Cause. The court went straight on to forfeit the goods and to declare them as condemned which was wrong. The owner of the goods has now surfaced in these revision proceedings. It is the duty of this court to correct the mistake made by the trial court in skipping a crucial and important step of enquiring whether the accused were the owners of the goods, and whether the owner of the goods was known before ordering forfeiture.

I thus find the order of forfeiture to be irregular or unlawful. In exercise of this courts revision powers under section 362 to 367 of the Criminal Procedure Code, I remit the file back to the trial court and order that the trial court does give the applicant herein audience to show cause before making a determination whether or not the goods should be forfeited or condemned. The consent regarding custody of the goods recorded herein will remain effective until the trial court makes its orders after the owner of the goods shows cause.

I order that this matter be mentioned before the Chief Magistrate at Garissa on 9th March 2016, to comply with the above orders of this court.

Dated and Delivered at Garissa this 4th day of March 2016.

GEORGE DULU

JUDGE