REPUBLIC OF KENYA

IN THE HICH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CRIMINAL APPLICATION NO 64 OF 1989

BETWEEN

THEOPHILE MWALEKWA MWASI..... 1ST APPELLANT

JEPHERSON MNGAMBWA MWASIGHE.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

RULING

(From High Court Criminal Appeal No 263 of 1988 consolidated with High Court Criminal Appeal No 264 of 1988)

November 17, 1989, **Bosire & Githinji JJ** delivered the following Ruling.

Upon appeal from the judgment of conviction and sentence of the Principal Magistrate, Mombasa, in his Criminal Case No 912 of 1987, we, on 25th November, 1988, quashed the convictions of Theophile Mwalekwa Mwasi and Jepherson Mngambwa Mwasighe, under our Criminal Appeal Nos 263 and 264 of 1988, for the offence of stealing by persons employed in the public service contrary to section 280 of the Penal Code, and set aside imprisonment terms which had been imposed on each of them. Wehowever, declined to interfere with an order of forfeiture of sums of money which were recovered from them. We granted liberty to them to bring proper proceedings for the return of the money to them.

The application before us purports to be brought pursuant to that liberty we granted. It is expressed to be brought under section 196 of the Customs and Excise Act Cap 472, Laws of Kenya, and section 3A of the Civil Procedure Act, and all its enabling provisions. However, neither provisionis relevant to the matters under consideration. section196, above deals with forfeitures under the relevant Act, and of goods which would ordinarily be liable to forfeiture under the Act. section 3A of the Civil Procedure Act, saves the inherent jurisdiction of the Court to make such orders as may be necessary in exercise of its civil jurisdiction under that Act. The court in the instant matter is being asked to invoke its civil jurisdiction in proceedings of a criminal nature. That is not procedurally correct. The application is fatally defective and incompetent.

Moreover in his memorandum of appeal against his conviction and sentence respecting the theft of the money in issue, the applicant did not attack the forfeiture order. Although this court has power under S.354CPC to make consequential or incidental orders that may appear to it just to make, the power is

discretionary. In exercise of its discretion under that section the court must act judicially. When we handled the applicant's appeal we did not consider it in the interests of justice to make any consequential or incidental orders regarding the forfeited money.

The prosecution case against the applicant, and his co-accused in the court below was that they stole foreign currencies which they later converted into local currency and divided the proceeds. It was also their case that the money which was recovered from the applicant was part of the proceeds of the stolen foreign currencies. The trial court received evidence part of which we ruled that it had been improperly admitted. It was that evidence which set out how the money the applicant had in his possession had been obtained. There was also evidence from Reginald Abunge Nyanjom (PW 8) that the applicant had told him that the money which he and his co-appellant had in their possession had been given to them by one Maulana. Maulana was their colleague at work and was also a suspect in the theft case. At the time of the applicant's trial he was still at large. The evidence on record is quite clear on that. Police were looking for him.

The applicant did not respond to the allegations which PW 8 made. Nor did he claim the money was his own. It is possible and probable that he did not lay claim to the money because he believed that the money belonged to Maulana. It is also possible and probable that the money did not and does not belong to Maulana. It may be that it is the applicant's money. It is, also, possible and probable that the money formed part of the proceeds of converted foreign currency which had been stolen as had been alleged in the particulars of the charge which the applicant and his co-accused in the court below faced.

The question as to who is owner of the money the applicant seeks to have restored to him requires investigation; and so is the ownership of the other money which was recovered form his co-appellant. In our judgment in the appellate proceedings we formed a general impression that the money appears to have been unlawfully obtained. We may be wrong. The issue needs to be sorted out more particularly because neither the Government nor Maulana has disclaimed ownership or interest in the whole amount of money or any part thereof. The matter cannot be sorted out in an application as the present one or one like it. It is not such an application we had in mind when in our judgment we said the applicant and his co-appellant could bring proper proceedings to claim the money.

We are not unmindful of the fact that forfeiture is a penalty. However, it can only be treated as a penalty where evidence clearly shows that the property forfeited belongs to the accused. The fact of an acquittal does not automatically entitled an accused to the restoration to him of properties which were recovered from him on suspicion that they had been stolen.

Evidence in the instant matter suggests that the money may have been unlawfully obtained.

We do not consider this to be a proper case for ordering restoration without a proper investigation of the issue of ownership.

The application is incompetent. It is struck out. Order accordingly.

Dated and delivered at Mombasa this 17th day ofNovember , 1989

S.E.O BOSIRE **E.M GITHINJI**

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JUDGE **JUDGE**