



REPUBLIC OF KENYA



KENYA LAW
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**Mogo Auto Limited v Republic & 2 others (Criminal Revision
E053 of 2023) [2025] KEHC 18241 (KLR) (4 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 18241 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL REVISION E053 OF 2023
CW MEOLI, J
DECEMBER 4, 2025**

BETWEEN

MOGO AUTO LIMITED APPLICANT

AND

REPUBLIC 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

OFFICER COMMANDING STATION (NGONG) 3RD RESPONDENT

RULING

1. The undisputed background to the revision application before this court, erroneously dated 4th October 2022 instead of 4th October 2023 is as follows. Stephen Kimanzi Timothy, the joint owner with Mogo Auto Limited (hereafter the Applicant) of motor vehicle registration No. KBY xxxA Mitsubishi pick-up (hereafter the subject motor vehicle) was on 24.07.2023 arraigned as the 3rd Accused person, alongside Noah Rumpo Pulei (1st Accused) and Joseph Ntingoti Mapi (2nd Accused) before the CM's Court in Ngong MCCR No. E909 of 2023.
2. The trio were charged with the offence of Removing forest produce contrary to Section 64(1) (a) as read with Section 68 (1) of the *Forest Conservation and Management Act*. The particulars of the charge stated that: "On the 22nd day of July 2023 at around 0230hrs along Ngong-Suswa Road in Nachu area, within Kajiado County, the accused persons were jointly found having Extracted from Mt. Suswa Caldera, a Forest produce of an endangered species namely; Eighty (80) Red Cedar (*Juniperus Virginiana*) with a street value of Kshs. 16,000, while using Motor vehicle Registration Number KBY xxxA (Mitsubishi, White in colour without a permit or any lawful exemption from Director general Kenya Forest Service".(sic)
3. The accused persons having pleaded guilty were convicted on their own plea of guilty, and sentenced to pay a fine of Kshs. 50,000/- each or in default, to serve 3 months imprisonment. Equally, the red



cedar produce was forfeited to the state through the Kenya Wildlife Service. The court further directed that the owner of the subject motor vehicle be summoned to show cause why the said vehicle should not be forfeited to the state, pursuant to the provisions of Section 68 of the [Forest Conservation and Management Act](#). It appears that the accused persons paid the fines.

4. Consequent to the notice, on the 4th of August 2023 Stephen Kimanzi Timothy appeared in court, having filed his show-cause affidavit sworn on 26.07.2023. To the general effect that he had been hired by the 1st Accused therein to transport the contraband goods; that the subject motor vehicle was pledged as security in respect of a loan from the Applicant herein that was applied to its purchase and he therefore sought release of the subject vehicle to him. Annexed to the affidavit was a copy of the logbook in the joint names of the Applicant herein and himself, and a security agreement dated 12.01.2023. Before the court, he orally stated as follows:

I was the driver of the vehicle when I was arrested. I had been hired to carry the forest produce. I have attached a logbook. The 1st accused paid the fine. He is Noah Pulei.”

5. Whereupon the prosecution prayed that a notice be issued to the Applicant to show cause. The court issued summons to the directors of the Applicant to appear on 14th August 2023, to show cause why the subject vehicle should not be forfeited to the state. However before that date, a notice of motion dated 9th August 2023 was filed under certificate of urgency on 10th August 2023 by the Applicant herein.
6. The motion was expressed to be brought under Sections 3 A of the [Civil Procedure Act](#), Orders 40, Rules 1 and 2 and 51 Rule 1 of the Civil Procedure Rules and named the Director of Criminal Investigations, Director of Public Prosecutions and the Officer Commanding Station (Ngong) as the 1st - 3rd Respondents, respectively . The key prayer therein sought that the court “be pleased to grant release orders compelling the Respondents by themselves, agents, employees or whomsoever to unconditionally release Exparte Applicant’s, Motor Vehicle Registration Number NO. KBY xxxA which is being detained at Ngong Police Station.”
7. The application was based on grounds inter alia that the Applicant was the co-owner of the subject motor vehicle pursuant to an asset financing loan agreement NO. AG 827xxx dated 12th January 2023 executed between the Applicant and Stephen Kimanzi Timothy for the sum of Kes. 650,000/= . And further, a security agreement which provided that the subject motor vehicle together with its logbook were to be used as collateral for the loan advanced, which was to be repaid within a period of 48 months from 10th February 2023 to 10th January 2027. As a consequence of which the subject motor vehicle was jointly registered in the names Stephen Kimanzi Timothy and the Applicant.
8. Through an affidavit sworn by Gladys Tanui, a Kenya Wildlife Services (KWS) officer who identified herself as the investigating officer of the case, the Respondents set out their grounds in opposition to the motion. Thereafter directions were given for the application to be canvassed by way of written submissions. Only the Applicant complied. In its ruling delivered on 29th September 2023, the lower court dismissed the application having found that the joint owners of the subject motor vehicle had failed to show cause why the vehicle should not be forfeited. Hence, the court ordered that the subject motor vehicle be forfeited to the State.
9. These orders prompted the revision motion by the Applicant erroneously dated 4.10.2022 which is the subject of this ruling. The application names the Republic, the Director of Criminal Investigations and Officer Commanding Station (Ngong) as the 1st to 3rd Respondents, respectively. The chief prayer in the motion seeks that the court “ be pleased to release to the applicant Motor vehicle KBY xxxA currently being retained by Kenya Forest Service as that is in the interest of justice” (sic).



10. The application, expressed be brought pursuant to inter alia Articles 27(1), 40, 49(1), 50(2) (a) of the Constitution and Sections 362, 364 and 367 of the Criminal Procedure Code, restated some of the grounds earlier raised before the subordinate court, in addition to the grounds that that the prosecution did not oppose the motion before the lower court, and that the trial court failed to consider the provisions of Section 389 A (2) of the Criminal Procedure Code. The grounds are amplified in the supporting affidavit of Erick Omondi Onditi sworn on 4th October 2023.
11. To the following effect; that the Applicant was a joint owner of the forfeited subject motor vehicle, pursuant to an asset financing loan agreement with one Stephen Kimanzi Timothy for the sum of Kes. 650,000/= executed on 12th January 2023, in respect of which he had defaulted; that the subject motor vehicle was in danger of being wasted; that Stephen Kimanzi Timothy having pleaded guilty had been convicted and sentenced to pay a fine of Kes. 50,000/- which was paid; that the application in lower court by the Applicant for the release of the vehicle was based on grounds that the Applicant as financiers did not have control of the subject motor vehicle and they would suffer great financial loss if the motor vehicle was forfeited to the State; and that by its ruling the subordinate court ordered the forfeiture of the subject motor vehicle.
12. It was further averred that the ruling was unreasonable and unfair for failing to consider that the Applicant were financiers; that the prosecution did not oppose the application; that the learned magistrate did not consider that Stephen Kimanzi Timothy had already paid the fine imposed and that the provisions of Sections 389 A (2) which provided that where the owner of the asset is innocent of the crime, forfeiture should not be ordered. It was further averred that the ruling was excessive, punitive, and violated the constitutional rights of an accused to a fair trial and to property; that the punishment was disproportionate to the crime and exposed the Applicant to financial loss; and that unless this court intervened, the Applicant's rights would be irredeemably defeated. The deponent concluding by praying for the setting aside for the forfeiture order in respect of the subject motor vehicle by the lower court.
13. The motion was scheduled to be heard on 5th December 2023, but in the interim period, a motion dated 15th November 2023 was filed by Stephen Kimanzi Timothy seeking to be enjoined as an interested party. Despite the motion being allowed on 29th April 2024, it does not appear that Stephen Kimanzi Timothy (hereafter the Interested Party) filed any responses or submissions in respect of the motion before this court.
14. Once more, a replying affidavit in opposition to the review application was sworn by Gladys Tanui an officer with the Kenya Wildlife Services. Therein she deposed that she was the investigating officer in the lower court case and that a following investigations she recommended the charges preferred against the accused persons in the lower court; that the subject motor vehicle driven by the Interested Party at the time of his arrest was according to records at the National Transport and Safety Authority (NTSA) co-owned by the Applicant and the said Interested Party; that before the lower court the Interested Party was given the opportunity to show cause why the subject vehicle should not be forfeited but did not appear until the conclusion of the matter; that the Applicant failed to provide evidence of the alleged default by the Interested Party in addition to the schedule of monthly repayment exhibited; and that the prosecution did object to the release of the motor vehicle through the affidavit sworn by the deponent on the 3rd August 2023.
15. She further stated that the Interested Party knowingly engaged in a criminal act using the subject motor vehicle, and disputed the asserted value of the motor vehicle as collateral for the loan of Kshs. 650,000/= . Finally stating that the evidence provided by the Applicant was insufficient to warrant the release of the subject motor vehicle, she sought that the same be forfeited to the state through the KWS who



- were the complainants in the lower court. In the alternative, she urged that should the court be inclined to grant the prayers sought, it ought to additionally order the Applicant to pay to the Respondents through KWS, the total sums paid in respect of the subject motor vehicle, including initial payments.
16. Only the Applicant filed their submissions in support of the motion despite the court's directions that the motion be canvassed by way of written submissions.
 17. The Applicant's submissions started by rehashing the affidavit material in support of the motion before contending that the trial court failed to consider its status as a financier and innocent co-owner thereof, and that before the lower court the prosecution did not oppose the application for the release sought. Citing Section 389A (2) of the Criminal Procedure Code, the Applicant asserted that the provision protects innocent owners from forfeiture, and that the punishment imposed was disproportionate to the offence. Here citing in support the case of *Bhavin Motors Limited v Republic; Mungai & 3 others (Accused) (Criminal Revision 10 of 2023) [2024] KEHC 9120 (KLR)* and *Peter Igeria Nyambura v Director of Public Prosecutions [2018] eKLR*.
 18. Before considering the merits of the motion before this court, it is apt to make some pertinent comments. First, the key prayer in the motion before this court appears to be a replica of the key prayer in the motion before the subordinate court, seeking release of the subject motor vehicle there described as detained at Ngong Police station. Hence as crafted the present motion contains no prayer for the setting aside of the forfeiture order, a prayer apparently included in the final depositions in the supporting affidavit of Erick Omondi Onditi.
 19. Equally, save for a few exceptions the same affidavit material was canvassed in respect of both applications. A new ground introduced in the motion stated that the Applicant being financiers had no control of the subject motor vehicle.
 20. On the face of it, the present motion invokes the court's revision power donated by Section 362 and 364 of the Criminal Procedure Code (CPC). This court cannot therefore be properly approached through the same prayers contained in the motion, whose outcome is sought to be reviewed. The proper cause is to seek review of the orders emanating from the lower court ruling, and not to place a second replica motion before this court, purportedly seeking review. On that score alone, the motion is liable to be struck out.
 21. Further, two depositions in the supporting affidavit in respect of the present motion contain misleading statements, firstly, that the motion in the lower court was not opposed by the prosecution, and second, that one of the grounds raised in that motion was that the Applicant as financiers had no control of the subject motor vehicle. A perusal of the lower court record reveals that an affidavit in opposition to the motion was filed by the agency concerned, namely KWS, and no statement was made by the prosecution to the effect asserted by the Applicant.
 22. Further, nowhere in the motion and supporting affidavit in the lower court did the Applicants state that they had no control of the subject motor vehicle. This statement of fact was inserted in their subsequent submissions. In a revision application in respect of an order arising from proceedings in the subordinate court, it is not open to a party to adduce new factual material to improve on their case. The revision application must be based on the same facts placed before the lower court and supported by legal arguments.
 23. The above notwithstanding, this court having given some consideration to the propriety of the application before it, as well as the fact that there is no prescribed format for approaching the High Court in seeking revision and that a mere letter or other notice would suffice, took cue from Article 159(2) (d) of the *Constitution*. Thus, opted to consider not the form, but substance of the motion now



before the court, invoking its revisionary power under Article 165 of the Constitution and Sections 362 and 364 of the CPC.

24. The court has considered the record of the lower court and the motion before it. The revision power of the High Court is in part donated by Article 165 of the Constitution which provides: -

- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but over a superior court.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

25. Section 362 of the Criminal Procedure Code on its part provides: -

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.”

26. Section 364(1) of the Criminal Procedure Code provides:-

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 his 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 Section 354, 357 and 358, and may enhance sentence;
 - (b) In the case of any other order other than an order of acquittal, alter or reverse the order.
- (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.”

27. The Court of Appeal in the case of *Amuno v Republic* (2025) KECA 1617 (KLR) observed with regard to the above sections that:

In view of the above, it is patent that the powers of revision under Section 362 of the CPC are invoked to enable the court satisfy 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 subordinate Court. Therefore, if the Subordinate court’s decision is wanting in its correctness, legality or propriety or the proceedings are irregular, the High Court will no doubt step in and correct the same. It follows that if no such situation arises, then the High Court cannot purport to exercise those powers therein and revise a lawful, legal and regularly issued order of the trial court”.

28. From the material placed before this court, the Applicant challenges the correctness, legality and propriety of the finding, and resultant order of the lower court that no cause had been shown why the subject motor vehicle should not be forfeited, and the resultant forfeiture order made. The forfeiture



order by the lower court in respect of the forest produce and subject motor vehicle was made pursuant to the provisions of Section 68 (1) of the *Forest Conservation and Management Act* the relevant portion which provides that :-

“Where a person is convicted of an offence of damaging, injuring or removing forest produce from any forest, the forest produce shall be forfeited to the owner. 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 vessels, vehicles, tools or implements used in the commission of the offence be forfeited to the Service:

Provided that

(2)

29. The above Section of the *Forest Conservation and Management Act* makes the forfeiture of forest produce mandatory after a conviction for offences under Section 64 (1) (a) of the Act. However, the range of additional orders that may be made against such a convicted person under Section 68 1(a), (b), and (c) of the Section are discretionary, as the lower court correctly observed in its ruling. The possible orders include forfeiture of vessels, vehicles and tools used in the commission of the offence. Further, the Section does not prescribe a procedure for forfeiture.

30. Where the procedure for discretionary forfeiture under any written law which is not provided in such law, recourse is had to Section 389 A of the CPC is in the following terms:

- (1) Where, by or under any written law (other than Section 29 of the Penal Code (Cap. 63)), 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.

- (2) If the court finds that the goods or things belong to some person who was innocent of the offence in connexion with which they may or are to be forfeited



and who neither knew nor had reason to believe that the goods or things were being or were to be used in connexion with that offence and exercised all reasonable diligence to prevent their being so used, it shall not order their forfeiture; and where it finds that such a person was partly interested in the goods and things it may order that they be forfeited and sold and that such person shall be paid a fair proportion of the proceeds of sale.”

31. From the foregoing provision, the onus was on the Interested Party and the Applicant to show cause why the subject motor vehicle should not be forfeited. For his part, the Interested Party contented himself with the assertions that the said asset was pledged as security to the Applicant and that he had been hired by his co-accused to ferry the offending forest produce in the subject motor vehicle. No proof of the alleged hire was tendered by him before the lower court, and as correctly asserted in the replying affidavit of Gladys Tanui, ignorance of the law is not a defence.

32. Besides, the Accused having been convicted on his own admission of the offence could not avail himself of Section 389A (2) of the CPC. The trial court correctly observed in its ruling concerning the Interested Party that;

One of the owners of this vehicle is not innocent as he was convicted by the court on his plea of guilty. He was in control of the vehicle at the time it was removing the forest produce. He did not state if (he) did anything reasonable to prevent the commission of the offence”.

33. The foregoing argument and finding in respect of the Interested Party was correct, on the material before the trial court. The inescapable fact of his conviction perhaps explains the Interested Party’s studious reticence before this court. It appears that before this court, the Interested Party’s brief was held by the Applicant who in challenging the forfeiture order argued that the fine imposed against the Interested Party sufficed, and that forfeiture ought not to have been ordered. True, forfeiture was discretionary, but it behoved the Applicant to show cause why forfeiture should not issue, and nowhere was the ground relating to the sentence meted against the Interested Party argued before the subordinate court. As with other similar grounds belatedly raised before this court, it is disingenuous of the Applicant to attempt to better its case as it went along.

34. The Applicant contends that the forfeiture order, coming after the imposition of a fine paid by the Interested Party, amounts to an excessive and disproportionate sentence. Beyond bare assertions, mostly targeting the forfeiture order, there was no attempt by the Applicant to demonstrate how the sentence was cumulatively excessive in so far as the Applicant was concerned. Suffice here to state that in *Bernard Kimani Gacheru v. Republic*, Cr App No. 188 of 2000 the Court of Appeal held 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 stated is shown to exist.

See also *Wanjema v. Republic* [1971] E.A 49



35. That said, this court, having looked at the ruling of the trial court, notes that the court implicitly accepted that the subject motor vehicle was jointly owned between the Applicant and the Interested Party pursuant to an asset financing arrangement. While the trial court concluded that both the Applicant and Interested Party had failed to show cause why the subject vehicle should not be forfeited, and giving reasons therefor concerning the Interested Party, with regard to the Applicant, no reasons for this conclusion are discernible from the ruling. The conclusion insofar as the Applicant is concerned therefore appears to be without a basis and erroneous for failing to correctly apply the provisions of Section 389 A to the facts of the case.
36. Section 389 A of the CPC prescribes the considerations to be borne in mind by a trial court while dealing with the question whether or not to make a forfeiture order. Having accepted that the Applicant was a joint owner of the subject motor vehicle, and in the absence of a definite finding that the Applicant was, firstly, not innocent of the forfeiture offence in question, or second, that the Applicant knew or had reason to believe that the subject motor vehicle was being or was to be used in connexion with the said offence but failed to exercise all reasonable diligence to prevent their being so used, the court could only order forfeiture under the second limb of section 389 A (2). On account of the fact that the Applicant was only partly interested in the subject motor vehicle as a joint owner pursuant to an asset financing arrangement.
37. It is true, as was observed by the lower court in its impugned ruling that the Applicant's motion before the lower court did not appear to address the question of the impending forfeiture, which was the purpose of the proceedings scheduled for 14.8.2023. Instead citing detention of the vehicle, the motion as drawn appeared to imply that the subject motor vehicle was only being temporarily detained pending trial. As seen from the second prayer seeking that photographs of the vehicle be taken "in the event that the motor vehicle is being used as exhibit in a criminal matter" and that the Applicant was experiencing "financial loss due to its detention".
38. It is only in submissions that the Applicant in addressing the issue of forfeiture asserted their innocence and lack of control of the subject vehicle as financiers, likelihood of financial loss, and invoking Section 389 A (1) urged that the vehicle be released to them. As drawn, that motion was misconceived and inappropriate for the occasion. Be that as it may, there was no dispute, and as the court found, that the subject motor vehicle was jointly owned pursuant to an asset financing agreement. The Applicant had not been charged or shown to be complicit of the forfeiture offence. Forfeiture proceedings under Section 389 A of the CPC or any other written law are not routine; they are anchored on the twin principles that a party ought to be heard before an adverse order is made against them, as well as respect for the sanctity of private property, as entrenched in Articles 40 and 50 of the *Constitution*.
39. In the court's view, the trial court fell into error by failing to apply the provisions of Section 389 A appropriately to the facts before it insofar as the Applicant was concerned. Had it done so, it would have come to the conclusion that while the Interested Party was the guilty party and liable to suffer forfeiture, the Applicant was ex facie an innocent party which was partially interested in the subject motor vehicle as a financier, hence entitled to the benefit in the second limb of Section 389 A(2) of the CPC.
40. That said, as pointed out in the replying affidavit of Gladys Tanui, the Applicant's material before the lower court did not disclose that the Interested Party was in default and the amount involved. No notices sent to him in that regard were exhibited, making it difficult to establish how much of the initial loan was outstanding at the material time. On the contrary, the copy of the loan statement of account marked annexure E004 and exhibited in the supporting affidavit before the trial court appears to suggest that the Interested Party was up to date with his installments, as of the date of the motion



in the lower court dated 9.08.2023. As before, the Applicants by their present motion surreptitiously sought to substitute a different document in this connection.

41. In the result, the court is persuaded that there is merit in the Applicant's motion to justify the partial grant of the revision application. The court, while maintaining the forfeiture order by the lower court, qualify the forfeiture order as hereunder:-

Pursuant to the provisions of Section 389A (2) of the Criminal Procedure Code, the forfeited subject motor vehicle registration No. KBY xxxA Mitsubishi pick-up shall be sold through a public auction, and the proceeds of the sale paid out in the following ratio; 40% (Forty per cent) to the Applicant, Mogo Auto Limited, and 60% (Sixty percent) to the State through the KWS.

42. It is so ordered. The revision application dated 4.10.2022 (sic) has succeeded to the above extent only.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 4TH DAY OF DECEMBER 2025

C. MEOLI

JUDGE

In the presence of:

For the Applicant: Ms. Kawai

For the Respondent: Mr. Kilunda

C/A: Lepatei

