



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA , MUSINGA & MURGOR, JJ.A.)

CRIMINAL APPEAL NO. 14 OF 2015

BETWEEN

EVANS LUMUMBA MOCHOGE APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Eldoret

(Lady Mshila, J.) dated 21st November, 2012

in

CR. REVISION NO. 177 OF 2012)

JUDGMENT OF THE COURT

1. **Isaac Ambani** was charged with the offence of failing to comply with a lawful requirement made by the Forest Officer contrary to **section 54 (1) (c)** of the **Forest Act, 2005**. It was alleged that on 5th February, 2012 along Kabenos - Eldoret road the accused was found in possession of five tonnes of cedar timber valued at **Kshs.400,000/=** loaded on a motor vehicle registration number **KAK 830 T** (*the motor vehicle*). He pleaded not guilty.
2. After a full trial, the accused was acquitted of the aforesaid charge. In his defence, the accused had told the trial court that he did not know the owner of the motor vehicle and the load of timber. Despite the acquittal, the trial court went on to order that the motor vehicle as well as the timber loaded thereon be forfeited to the Kenya Forest Service. The forfeiture order was allegedly made under **section 55 (1) (c)** of the **Forest Act**.
3. By a letter dated 19th October, 2012, **Evans Lumumba Mochoge**, the owner of the motor vehicle through his advocates, **Anassi Momanyi & Company**, sought revision of the order of forfeiture of the motor vehicle under **section 362** of the **Criminal Procedure Code**. He stated that the order of forfeiture was illegal and incompetent as there had been no conviction in the criminal case that was before the trial

court.

4. **Section 55 (1) (c)** of the **Forest Act** provides as follows:

“55 (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) ...

(b) ...

(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.”

5. Upon perusal of the trial court file, the learned judge held that there having been no conviction the trial court ought not to have made an order of forfeiture. She in the circumstances allowed the application for revision and set aside the order of forfeiture. The learned judge did not stop there; she proceeded to state as follows:

“This Court notes that to date the lorry remains unclaimed and that there is no prayer for its release.

The court orders that the Kenya Forest Service do issue a Gazette Notice to (sic) and thereafter proceed to administratively forfeit and dispose of the unclaimed vehicle.”

6. **Evans Lumumba Mochoge**, the owner of the motor vehicle, being dissatisfied with the final decision of the High Court ordering an administrative forfeiture and disposal of the motor vehicle, preferred an appeal to this Court.

Mr. Momanyi, learned counsel for the appellant, submitted that the learned judge erred in making the aforesaid order, even without affording the appellant a hearing. He further submitted that as long as the accused was not convicted of the offence as charged, no forfeiture of the vehicle could be ordered. He prayed that the vehicle be released to its owner forthwith.

7. **Mr. Omwega**, Assistant Deputy Public Prosecutor, conceded the appeal to the extent that the procedure for forfeiture was not followed in that no notice of forfeiture was ever served upon the owner of the motor vehicle. He, however, urged the Court to invoke **section 361 (2)** of the **Criminal Procedure Code** and remit the matter to the trial court so that it complies with the procedure stipulated under **section 389 A** of the **Criminal Procedure Code**.

8. In a brief reply, **Mr. Momanyi** stated that there was no legal basis of remitting the matter to the trial court since there had been no conviction.

9. We have considered the record of appeal as well as the brief submissions by counsel. We are in agreement with both counsel that under **section 55 (1) (c)** of the **Forest Act** a forfeiture of the motor vehicle could not be ordered in the absence of a conviction of the accused.

10. **Section 389 A (1)** of the **Criminal Procedure Code** states as follows:

“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 thing 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.”

11. The owner of the motor vehicle in question was well known. Mr. Momanyi had severally appeared before the trial court on behalf of the owner of the vehicle and indicated that his instructions were to have the vehicle released. The owner of the motor vehicle is the one who had made the application for review of the trial court’s order of forfeiture in which he prayed for its release to him. In those circumstances, we are at a loss as to how the learned judge could state that: *“the lorry remains unclaimed and that there is no prayer for its release.”*

12. We are in agreement with both Mr. Momanyi and Mr. Omwega that the High Court erred in law in directing that the Kenya Forest Service do issue a Gazette Notice and thereafter proceed to forfeit *“the unclaimed vehicle.”* The truth of the matter was that the appellant had established that the motor vehicle ought to have been released to him. Consequently, we allow this appeal and set aside the order of Mshila, J. ordering the Kenya Forest Service to issue a Gazette Notice and thereafter proceed to administratively forfeit and dispose of the motor vehicle. We substitute therefor an order directing that motor vehicle registration number KAK 830T be released to the appellant.

It is so ordered.

DATED and delivered at Eldoret this 15th day of June, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR