



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal No 61 of 2004

Muya.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

Judgment.

Muya v Republic 515 (Appeal from an Order of the High Court of Kenya at Nyeri (Lady Justice Okwengu) dated 24th February, 2004 in HCCR Revision No 6 of 2003)

Criminal Practice and Procedure – forfeiture – forfeiture of property to the State - order of forfeiture of motor vehicle as a tool or implement used in committing the offence of illegally removing forest produce – Forests Act (cap 385) sections 8, 14 – whether the owner of the motor vehicle who is not an accused person entitled to be heard before the order of forfeiture is made.

Environmental Law – forest conservation – offence of removing forest produce contrary to the Forests Act (cap 385) sections 8, 14 – court convicting the driver of motor vehicle used to ferry logged camphor – court ordering forfeiture of the motor vehicle – whether the owner of the motor vehicle who was not an accused person was entitled to be heard before the order of forfeiture was made.

Criminal Practice and Procedure – revision – revisionary jurisdiction of the High Court – whether and on what grounds a decision of the High Court in its revisionary jurisdiction is appellable to the Court of Appeal.

Two persons were charged in the subordinate court with the offence of cutting and removing forest produce contrary to the Forest Act (cap 385).

These persons were the alleged owner of the camphor beams in question and the driver of the motor vehicle in which they were being ferried. The driver told the Court that he had only availed his vehicle for hire and he did not know that the camphor had been illegally logged.

The trial court convicted the accused and in addition to sentencing them to a fine of Kshs 10,000, ordered the forfeiture of the motor vehicle. None of the accused persons appealed against the decision of the trial court.

Joseph Muya moved the High Court asking it to revise the order of forfeiture. He argued that the forfeited motor vehicle belonged to him, that he was not an accused person in the case and he was not given a chance to show the trial court whether the offending driver was his agent or not. The High Court declined to revise the order of forfeiture and he appealed against the decision.

Held:

1. Under the Forests Act section 14 (2)(a)(b) and (c), a court trying the offence is entitled to make an order for compensation and/or forfeiture in addition to any other penalty. An order for compensation may be made against the accused person or, where it is shown in evidence that the accused was an employee or agent of some other person, it may be made against that other person unless he shows, after being given an opportunity to do so, that the offence was committed without his neglect or default.
2. No order for compensation was made in this case. The order which was made was for forfeiture under paragraph (c) of the section. There is no requirement under that provision that any person be heard before the tools or implements used in the commission of the offence are ordered forfeited.
3. An order made by the High Court in the exercise of its revisionary jurisdiction is deemed to be a decision of the High Court in its appellate jurisdiction and accordingly, the decision in this case was appealable to the Court of Appeal on a matter of law.

Appeal dismissed.

Cases

No cases referred to.

Statutes

1. Forest Act (cap 385) sections 8(1) (a) (i); 14 (1) (a); 14 (2) (a) (b) (c)
2. Criminal Procedure Act (cap 75) section 361 (7)

May 14, 2004, the following Judgment of the Court was delivered.

James Okioga Siungi and George Karigu Gatonga were charged in the Magistrate's Court with the offence of cutting and removing forest produce contrary to section 8(1) (a) (i) as read with section 14 (1) (a) of the Forest Act cap 385 Laws of Kenya. The particulars of the offence were stated in the charge sheet to be that on the 30th day of August, 2003, along Ragati Karatina road, in Nyeri district, within Central province, they were found having cut and removed 70 pieces of Camphor beams valued at Kshs 196,000/= using a motor vehicle registration No KMN 363 Nissan Camble without the authority of the Chief Conservator of Forests.

At the trial it transpired that the accused persons had been arrested at 3.30 am, that the timber in question belonged to James Siungi and that the motor vehicle in question was being driven by George Gatonga. Siungi maintained that the timber had been picked from his home and that he had bought it from various people. George Gatonga for his part stated in his unsworn statement of defence that his vehicle was for hire, that the co-accused came and told him he had work to be done, and that they went and picked the timber. He did not know it was illegal timber. On evaluating the evidence, the senior resident magistrate found the accused persons guilty as charged and duly convicted them. He fined each of them Kshs 10,000/= and, in default, three months imprisonment. The Court also ordered that the motor vehicle involved be forfeited to the State. Those orders were made on 18th November, 2003. None of the accused appealed against either conviction or sentence to the High Court.

By a letter dated 3rd December, 2003 and filed in court on 4th December, 2003, Mr Peter Muthoni, Advocate, moved the High Court on behalf of one Joseph Kabuchwa Muya to revise the order of

forfeiture. In the letter, he complained that motor vehicle KMN 363 belonged to his client who was not an accused person in the case. The revision was sought on the grounds that the applicant was not given a chance to make his representations to the trial court as to whether or not the offending driver was his agent or not. It was contended that the provisions of section 14 of the Forest Act were not complied with. Attached to the letter were the charge sheet and proceedings of the Magistrate's Court, a logbook and agreement for sale. The file was placed before Lady Justice H M Okwengu who on 24th February, 2004 ruled as follows:

"I have perused the record of the lower court but find no illegality, impropriety or irregularity in the proceedings as would justify intervention under section 364 of the Criminal Procedure Code. The trial magistrate was satisfied that motor vehicle KMN 363 was used to transport timber illegally procured from the forest. That was the basis for the order of forfeiture of the motor vehicle. The person now claiming ownership of motor vehicle does not feature in the proceedings, alleged owner's name not in the logbook.

This is not a case appropriate for revision".

The applicant (who is the appellant in the appeal) now appeals against that order to this Court. The substance of the grounds of appeal and the arguments advanced before us was that the learned judge erred in law and in fact in failing to exercise her powers of revision for reversal of the forfeiture order when the record of the trial court disclosed that: (i) the appellant was not accorded a chance by the trial court to make his representations on whether the offending driver was his agent or not in flagrant breach of the provisions of section 14 (2) (b) and (c) of the Forest Act, a glaring impropriety, irregularity or illegality on the face of the record warranting revision; and (ii) the appellant was not an accused person and was condemned unheard.

It was further complained that the judge misdirected herself in finding that the motor vehicle did not belong to the appellant simply because his name was not in the logbook while the issue of ownership was not disputed.

It was further complained that the judge erred in fact and in law in not finding that the order for forfeiture of the vehicle was harsh, punitive and unsustainable in law as the appellant was not involved at all.

Now, section 14 (2) (a) (b) and (c) of the Forests Act provides as follows:

"14 (2) where a person is convicted of an offence whereby forest produce has been damaged or injured or removed, the Court shall, in addition to any other penalty, order that person –

(a) to pay to the Director of Forestry by way of compensation the value of the forest produce so damaged, or injured or removed; and

(b) If it is proved to the satisfaction of the Court that the person convicted is the agent or employee of another person, the Court may order that other person to pay the compensation unless, after hearing that other person, the Court is satisfied that the offence was not due to his neglect or default.

(c) The forest produce removed and any tools or implements used in the commission of the offence be forfeited to the Chief Conservator of Forests".

In our understanding of the above provisions of law, the Court is in addition to any other penalty entitled to make an order of compensation and/or an order of forfeiture. The order of compensation may be made in favour of the Director of Forestry to compensate for the value of the produce injured, damaged or removed. Such order may be made against the accused person or, where it is shown in evidence that the accused was an employee or agent of some other person, it may be made against that other person unless he shows that the offence was committed without his neglect or default. The order of compensation cannot be made against a person other than the accused unless he has been given an opportunity to show whether or not the offence was committed without his neglect or default.

No order of compensation was made in this case and the appellant cannot be heard to complain that the provisions of paragraph (b) of subsection (2) were contravened in relation to him. The order which was made here was for forfeiture under paragraph (c). There is no requirement under that provision that any person be heard before the tools or implements used in the commission of the offence are ordered forfeited. We think that the appellant's advocate misapprehended the provisions of section 14 (2) (a) (b) and (c) of the Forests Act and made a misconceived request for revision.

In our considered view, the proceedings before the trial court did not disclose any illegality, impropriety, or irregularity in the order of forfeiture made and the learned judge of the High Court correctly declined to make any orders in revision.

At the hearing of this appeal, we sought to know from counsel for the appellant whether we had jurisdiction to hear an appeal from an order made in the exercise of the revisionary jurisdiction of the High Court.

Although counsel for the appellant wavered in his answer and counsel for the Republic took the view that there was no right of appeal, we have after careful scrutiny of the provisions of section 361 (7) of the Criminal Procedure Code, cap 75 of the Laws of Kenya, come to the conclusion that we had jurisdiction to entertain the appeal. The provision is to the effect that an order made by the High Court in the exercise of the revisionary jurisdiction shall be deemed to be a decision of the High Court in its appellate jurisdiction. Accordingly, the decision of the High Court in this case was appealable to this Court on a matter of law.

The upshot of this matter is that having found that the learned judge did not err in law in making the order that was made in revision, and that it is the appellant who misapprehended the pertinent provisions of the Forests Act upon which he predicated his application for revision, we are impelled to dismiss this appeal. It is so dismissed.

Dated and delivered at Nyeri this 14th day of May, 2004.

P.K. TUNOI

JUDGE OF APPEAL

E.M. GITHINJI

JUDGE OF APPEAL

A.G. RINGERA

AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR