



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyaga v Director of Public Prosecution (Criminal Appeal  
E042 of 2023) [2024] KEHC 7811 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7811 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL APPEAL E042 OF 2023  
HM NYAGA, J  
JUNE 27, 2024**

**BETWEEN**

**JOSEPH NYAGA ..... APPELLANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

*(Being an appeal from the Ruling of Hon. L. Akoth (S.R.M) in  
Nakuru CMCR No. E 2529 of 2013 delivered on 4/11/ 2019)*

**JUDGMENT**

1. The Appellant Joseph Nyaga was charged with the offence of removal of forest produce contrary to Section 64(1) (a) as read with Section 64(2) and 68(1) (c) of the [Forest Conservation and Management Act 2016](#).
2. The particulars of the offence were that on 13<sup>th</sup> October, 2023 at 11:30hrs he was found along Nairobi-Nakuru highway within Nakuru County removing forest produce namely 7 tonnes of cypress logs valued at Ksh. 150,000/= using a Motor Vehicle Registration No. KBY 649U make Isuzu white in colour with a blue body, without authority from the chief conservator of forests, Kenya Forest Service.
3. On 17<sup>th</sup> October, 2023 the charge and facts of the offence were read to him and he pleaded guilty.
4. On 18<sup>th</sup> October, 2023 he was sentenced to pay a fine of Ksh. 50,000/= and in default to serve 3 months' imprisonment.
5. The court also summoned him to appear in court on 31<sup>st</sup> October, 2023 to show cause why the said Motor Vehicle should not be forfeited.
6. On 31<sup>st</sup> October, 2023, the Appellant told court that he depended on the motor vehicle to fend for his family and he normally had a permit which expired 13 hours before it was taken.



7. On 22<sup>nd</sup> November, 2023, prior the delivery of the court's ruling, Mr. Wanjir, the counsel for the Accused made an application for deferment of the ruling on grounds that he had just been instructed to come on record for the accused and in the interests of justice and fair hearing the accused should benefit from legal representation in this matter. The state left the matter to court.
8. The trial court disallowed the application for reasons that the Ruling was ready and Notice to show cause was issued on 31.10.2023 therefore the accused had ample time to obtain representation but he only opted to do so after the file was placed aside.
9. The trial court thereafter rendered its decision to the effect that the motor vehicle registration number KBY 649 U be forfeited to the Chief Conservator of the forest or to any person delegated by the conservator in writing.
10. The Appellant being aggrieved by the said decision has lodged this appeal in which he raised fifteen (15) grounds summarized as follows;
  - a. That the Learned Trial Magistrate erred in Law and in fact by disregarding the Appellant's rights to fair trial and legal representation.
  - b. That the Learned Trial Magistrate erred in Law and in fact by infringing the fundamental rights to property and privacy of the Appellant.
  - c. That the Learned Trial Magistrate erred in Law and in fact by failing to take into account the principle of proportionality in sentencing.
  - d. That the Learned Trial Magistrate erred in Law and in fact by failing to take into account that Section 68(2) of Kenya *Forest Conservation and Management Act* (KFCMA) does not automatically allows forfeiture of the Motor Vehicle or Vessel used in conveyance of the forest produce. The objective is the compensation for loss or damages caused to the forest as a result of the offence committed.
  - e. That the Learned Trial Magistrate erred in Law and in fact by failing to properly interrogate the Appellant's evidentiary documents.
  - f. That the Learned Trial Magistrate erred in Law and in fact in failing to apply the well-established principles of evidence.
  - g. That the Learned Trial Magistrate erred in Law and in fact by failing to consider that the said Motor Vehicle is co-owned by the Appellant and Equity Bank where the Appellant is still advancing the Mortgage.
  - h. That the Learned Trial Magistrate erred in Law and in fact by failing to consider that the forfeited Motor Vehicle is the Appellant's only tool of trade and source of income to his family.
11. The Appeal was canvassed through written submissions.

### **Appellant's Submissions**

12. In regard to whether the trial magistrate erred by disregarding the Appellant rights to fair trial and representation, the counsel for the Appellant Cited Articles 50(1)(g) and 47 and the case of Peter Igiria Nyambura vs Director of Public Prosecutions [2018] eKLR where the court held inter alia that it is necessary to avoid prejudice to the administration of justice in particular proceedings on forfeiture.



13. The Counsel submitted that the court failed to afford the appellant an opportunity to benefit from legal representation without any sufficient reasons for the same despite the counsel application for representation prior the delivery of the ruling.
14. He argued that owing to the magnitude of the decision on forfeiture and involvement of limitation of rights to property and privacy, the court would have afforded the Appellant the right to legal representation. In buttressing his submissions, the counsel placed reliance on the cases of *Pett vs Greyhound Racing Associate* (1968) 2 All E.R 545 at 549 cited with approval in *F.O.O. vs Republic* (2020) eKLR where in support of this right, Lord Denning had this to say;

“It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross examine witnesses. We see it every day. A magistrate says to a man: "You can ask any questions you like"; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?”
15. The counsel also relied on the cases of *Fraser vs ABSA Bank Limited* (66/05) (2006) ZACC 24; [2007 \(3\) SA 484 \(CC\)](#); [2007 \(3\) BCLR 219 \(CC\)](#); & *S vs Daniels & Another* 1983(3) 275(A); *Joseph Kiema Philip vs Republic* (2019) eKLR.
16. With regard whether the trial magistrate erred in her interpretation and application of the provisions of Section 389 A of the Criminal Procedure Code, Section 64(1) and (2) and Section 68 of the [Forest Conservation and Management Act](#), and therefore, she arrived at the wrong conclusion of the law, the Counsel submitted that Section 389 A of the Criminal Procedure Code must be read with Article 24 of [the Constitution](#).
17. Citing the case of *Peter Igiria Nyambura vs Director of Public Prosecutions*(supra) on the interpretation of Section 389 A CPC and Section 68 of the Forest Management Act, the Counsel submitted that the trial court misinterpreted the above provisions by failing to appreciate that the Appellant was in lawful business of moving produce and which he kept renewing permits from relevant authorities. The Counsel also argued that the court failed to ensure that the limitation of the Appellant’s constitutional rights was reasonable and justifiable.
18. With respect to whether the trial magistrate erred in failing to take into account the Principle of Proportionality as a form of punishment, the counsel submitted that by dint of Article 50(2)(p) of [the Constitution](#), the Appellant had the right to benefit from least severe sentence. To further bolster his submissions, the counsel relied on the cases of *Peter Igiria Nyambura vs Director of Public Prosecutions*(supra) & South African case of *Simon Prophet vs The National Director of Public Prosecution*.
19. The counsel argued that the trial court erred in failing to take into account the principle of proportionality in sentencing. That the order on forfeiture is undoubtedly disproportionate to the nature and gravity of the offence in which the applicant was fined Kshs. 50,000/=
20. On whether a reasonable tribunal properly directing its mind on law and facts would have arrived at the decision of the learned magistrate, the counsel argued that the lower court proceedings fell short of its legitimate expectation provided under Article 47 of [the Constitution](#) as it failed to deliberate on the evidence in totality so as to accord the appellant his right of fair hearing as provided for in [the constitution](#).



21. He prayed that the Appeal be allowed, the aforesaid forfeiture orders be vacated and the subject Motor Vehicle be released to the Appellant.

### **Respondent's Submissions**

22. On whether the learned trial magistrate erred in law and fact by disregarding the Appellant's rights to fair trial and legal representation, the respondent submitted that right to legal representation provided under Article 50(2)(g) of *the Constitution* is not absolute. The respondent posited that the appellant had sufficient time to engage the services of an advocate but he slept on his rights and brought it at the tail end of the proceedings and when the ruling was ready.
23. The respondent argued that further the appellant was able to represent himself and as such he was not prejudiced in any way as he was able to fully participate in the proceedings and therefore the trial magistrate was right in disallowing the counsel's prayer for arrest of the judgement.
24. On whether the trial magistrate erred in law and fact in ordering for the forfeiture of the Appellant's motor vehicle, the respondent cited the provisions of Section 68(1) of the *Forest Conservation and Management Act* and submitted that the Appellant's motor vehicle was an instrument of crime and that the trial magistrate followed the due process in ordering for the forfeiture of the same. The respondent posited that forfeiture of instruments of crime is one of the ways of combating crime in society and in this instance to also deter other members of the public from depleting the forest cover in our nation.
25. The respondent submitted that the appeal lacks merit and urged this court to entirely dismiss the same.

### **Analysis and Determination**

26. As a first Appellate Court, the duty imposed upon it is as was set out in *Okeno vs Republic*(1972) EA 32 as follows;

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs. Republic* (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala Vs. R.* (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters vs. Sunday Post* [1958] E.A 424.”

### **Issues for Determination**

27. The issues that arise for determination are: -
- a) Whether the Appellant's right to fair trial was infringed upon;
  - b) Whether the Appellant's rights to privacy and property were infringed;
  - c) Whether the order of forfeiture was disproportionate to the nature and gravity of the offence.



28. Depending on my finding on (a) above, I may not need to look at the other issues. I will only address them if the answer is in negative. Should the answer be in the affirmative, the court may pre-empt arguments to be made before the trial court, to the prejudice of the parties herein.

29. Article 50(2) of *the Constitution* provides safeguards of an Accused's Right to fair trial. Amongst the tenets of fair trial is the Right to choose, and be represented by an advocate and to be informed of this right promptly. It stipulates as follows: -

- “(2) Every accused person has the right to a fair trial, which includes the right—
- (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;”

30. In *Thomas Alugha Ndegwa vs Republic* [2016] eKLR the Court of Appeal stated;

“In Kenya, Section 43(1) of the *Legal Aid Act* sets out the duties of the court before which an unrepresented accused person is presented. Such Court is required to promptly inform the accused person of his right to legal representation; promptly inform him of his right to have an advocate assigned to him if substantial injustice is likely to result; and to inform the National Legal Aid Service to provide legal aid to the accused person... it is clear the framework for full implementation of Article 50 (h) is now in place as required by *the Constitution*. Section 40 of the Act requires that a person who wishes to receive legal aid may apply to the Service in writing so long as such an application is made before the final determination of the matter by a court, tribunal or any other forum to which the application relates. In light of the constitutional and statutory provisions aforementioned, the provision of legal aid is a constitutional, legal and human right.

31. Further in *Republic vs Karisa Chengo & 2 others* [2017] eKLR the Supreme Court stated:

“It is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the *Legal Aid Act*, various other factors which include:

- (i) the seriousness of the offence;
- (ii) the severity of the sentence;
- (iii) the ability of the accused person to pay for his own legal representation;
- (iv) whether the accused is a minor;
- (v) the literacy of the accused;
- (vi) the complexity of the charge against the accused”

32. In *Dominic Kamau Macharia vs R* CR App No. 72 of 2012, [2014] eKLR the court explained that substantive injustice would occur in cases such as where there are complex issues of law or fact, where



the accused is unable to conduct his own defence, or where public interest requires that representation be provided.

33. The court went on to explain that substantial injustice may be said to be subject to three test. First, is the complexity of the case. This is discernible from the issues of fact and law which may not be comprehended by the accused. The second test relates to the seriousness or nature of the offence in question. A serious offence may attract public interest to the extent that the public may require that some form of representation to be accorded to the accused owing to the nature of the offence. The third and final test relates to the ability of the accused person to conduct his own defence. Language difficulties experienced during the trial may be a perfect indicator of an accused person's inability to conduct a defence.
34. In this case, I note that the Appellant was acting in person. He pleaded guilty to the offence. Prior the delivery of the ruling, he engaged an advocate. The said Advocate applied for deferment of the Ruling to allow the Appellant benefit from legal representation but the court declined the same.
35. With the application by counsel before her and the grim consequences that the appellant would have been likely to suffer, it is my opinion that the trial magistrate ought to have deferred the ruling to enable the Appellant benefit from legal representation. Disallowing the application made by the counsel was draconian, considering no party would have been prejudiced if the ruling was deferred.
36. After considering the first ground of appeal, I am in agreement with the counsel for the Appellant that the orders issued on 22<sup>nd</sup> November, 2023 to the effect that the motor vehicle registration number KBY 649 U be forfeited to the Chief Conservator of the forest or to any person delegated by the conservator in writing did not pass the test of a fair trial.
37. Consequently, I proceed to quash and set aside the aforesaid orders, and direct that the appellant to appear before the trial Court afresh, to show cause why the subject Motor Vehicle should not be forfeited pursuant to Section 389 A of the Criminal Procedure Code. I shall give a date shortly after delivery of this ruling.
38. Having stated the above, and as I had intimated earlier, I find it unnecessary to address the other grounds.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 27<sup>TH</sup> DAY OF JUNE, 2024.**

**H. M. NYAGA**

**JUDGE**

In the presence of;

Court Assistant Jamleck

State counsel Nancy

Applicant present

Mr. Wanjir for Applicant

