

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 31 OF 2021

(Arising from Misc. Criminal Application No. 1/2021 of Kigoma District Court before Hon. E.B. Mushi, - RM)

NOVATUS ANSELIMI MOSHY..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

J U D G M E N T

20/04/2022 & 13/05/2022

L.M. MLACHA, J.

In Economic Case No. 2 of 2020 of the district court of kigoma at kigoma, one Silvester Zacharia was charged of Unlawful Possession of Forest Produce c/s 88 of the Forest Act No. 14 of 2002 as amended by section 28 of the Written laws (Miscellaneous Amendment) Act No. 2 of 2016 and Unlawful Transportation of Forest Produce Without Licence or Written Authority c/s 89(b) of the Forest Act No. 14 of 2002 as amended by the Written Laws Miscellaneous Amendment Act No. 2 of 2016 read together with paragraph 33 the Economic and Organized Crimes Control Act, cap

200 R.E. 2002 as amended by section 16(b) of the Written laws (Miscellaneous Amendment) Act No. 2 of 2016 read together with section 97(1)(b) of the Forest Act No. 14 of 2002. It was alleged that he was found with the products on 16/3/2019 at Uvinza Police barrier within Uvinza District, Kigoma region. The forest produce was in a lorry Fuso, Registration No. 731 CVA. It had 38 logs of '*Mpilipili tree*' valued at Tshs. 874,800/= . He pleaded guilty. He was found guilty and convicted accordingly.

The district court (E.B. Mushi RM) sentenced him to a fine Tshs 250,000/= or Six months in jail and fine Tshs 1,000,000/= or two years in jail for the first and second counts respectively. It proceeded to make an order that 'the motor vehicle T731 CVA make Fuso and forest produce that is 38 logs' be confiscated to the government of the United Republic of Tanzania under section 351(a) and (b) of the Criminal Procedure Act, Cap. 20 R.E. 2019. The order was made on 23/12/2020.

On the 3/2/2021, the appellant, Novatus Anselimi Moshy filed Miscellaneous Criminal Application No. 1 of 2021 under certificate of urgency against the Republic (first respondent) and Silvester Zacharia (second respondent) seeking two orders namely:

- i. That the Hon. court may be pleased to investigate as to who is the real owner of the motor vehicle with registration T.731 CVA, make Fuso.*
- ii. That Hon. court may be pleased to grant orders for vacating confiscating order in Economic Case No. 2 of 2020 dated 23/12/2020 against confiscation of motor vehicle with registration T731 CVA, make Fuso which is not the property of the 1st respondent.*

The second respondent was the former accused person, Silvester Zacharia. He never entered any appearance or file any counter affidavit. The first respondent Republic lodged a preliminary objection saying that the application was incompetent before the court. The court upheld the objection and dismissed the application on the ground that it was lodged under wrong provisions of the Law. Further that, the court was functus officio. The appellant was aggrieved hence this appeal. The grounds upon which the appeal is based read as under:

- 1. That, the trial court erred in law and fact by deciding that it had no jurisdiction to vacate the forfeiture and confiscation order while the law give it jurisdiction to do so.*

2. *That, the trial court erred in law and fact by declaring the Appellant's Application to be functus officio while the doctrine is not applicable in Application for recovering the property which was ordered for forfeiture and confiscation as the law enjoy.*
3. *That, the trial court erred in law and fact by ordering the forfeiture and confiscation of the Applicant's property without following procedure for the sale of property of a person who was not involved in committing of crime.*
4. *That, the trial court erred in law and fact by ordering the forfeiture and confiscation of the Appellant's property without giving the Appellant the right to be heard.*

Mr. Michael Mwangati appeared for the appellant while Mr. Robert Magige State Attorney appeared for the respondent Republic. Hearing was done by oral submissions.

Submitting in ground one, counsel for the appellant said that the court is allowed to receive an application by any person who is interested in the property within Six (6) months of the issue of the order under section 351(2) of the Criminal Procedure Act, Cap. 20 R.E. 2019 (the CPA). He went on to say that the applicant received the decision on 23/12/2020 and filed his application on 3/2/2021. The application was received and dismissed as functus officio contrary to section 351(2) of the CPA. He

went on to say that section 351(2) of the CPA is read with section 16(b) of the Proceeds of Crime Act, Cap. 256 R.E. 2019 which allows a third party to file the application. He added that the applicant brought the application but could not be heard. He referred the court to **Gilbert Aphonce Mgoyo v. R.**, Criminal Revision No. 1 of 2020 (H/C) page 14 and **Mapande and Tours Ltd v. DPF**, Criminal Appeal No. 56 of 2020 (H/C), page 5 and argued the court to follow the decision. Counsel submitted that the court explained the procedure to be followed in such a situation adding that the magistrate had power to hear the case.

In ground two, counsel submitted that the principle of *functus officio* does not apply in forfeiture orders. He said that section 351(2) has a procedure to challenge the order. He stressed that, the principle cannot apply in those cases, he said.

In ground 3, counsel submitted that the procedure of forfeiture provided under section 35(1), (2), (3) and (4) was not followed by the lower court. He said that subsection (2) is clear that if any person with interest appears, he must be heard but the court declined to hear the applicant.

And finally, in ground 4 it was submitted that the refusal to hear the applicant is a denial of the basic right to be heard. He added that the denial of the right to be heard vitiated the whole proceedings as said in **DPP v. Sabina Tesha and others** [1992] TLR 237.

Counsel requested the court to set aside the confiscation order and vacate the decision made by the lower court. He asked the court to make an order releasing the lorry, T731 CVA, Mitsubishi Fuso to the applicant.

Submitting in reply to ground one, Mr. Robert Magige state attorney said that the district court did not have jurisdiction to hear the application. The cited provision did not give the magistrate power to hear the application, he said. He said that the law is clear that where the court has issued a confiscation order in respect of property but has not issued an order for disposal, a person aggrieved can bring an application. He added that section 35(1)(a) and (b) talk of confiscation and delivery of the property which is not similar to what is provided under section 351(1) and (2). He went on to say that the court complied with section 351(a) and (b) by confiscating the property and directing it to go to the government. The magistrate confiscated the lorry to the government of the United Republic of Tanzania, he said. Counsel proceeded to say that where the court has

issued a confiscation order but has not issued an order for destruction or delivery, a person interested can come under section 351(2) of the CPA to object. The hands of the magistrate were already tied because he had already ordered the lorry to be handed to the government.

In ground 2, the counsel for the respondent Republic had the view that the principle of *functus officio* applied because it was the same court and the same magistrate. The court had no power to make a second order because it was *fructus officio*, he said.

In ground 3 counsel submitted that no one came to claim the lorry during the conduct of the case. He should not come now. Counsel proceeded to submit in ground 4 and said that the appellant was given a right to be heard in the objection proceedings which resulted into the dismissal of the application. He argued the court to dismiss the appeal.

The counsel for the applicant made a rejoinder submission and said that the court had a power to hear him under section 351(2) of the CPA read with section 16(b) of the Proceeds of Crime Act. He referred the Court to the decision of this court made in *Gilbert Alphonse Mgoyo (supra)*.

I have taken time to examine the records in Economic Case No. 2 of 2020 and Miscellaneous Criminal Application No. 1 of 2021. I have also read the cited cases and considered the counsel submissions. I think the parties are quarrelling on three issues; (i) whether the district court had jurisdiction to vacate the forfeiture and confiscation order, (ii) whether the district court was fructus officio and (iii) whether the district court was correct to order confiscation of the property without giving the appellant the right to be heard. I will discuss them together starting with the confiscation order.

The confiscation order can be reproduced in part as under:

"... the motor vehicle T731 CVA make FUSO and forest produce that is 38 logs, I do hereby order to be confiscated by (sic) the government of The united republic of Tanzania as per section 351(a) and (b) of the CPA cap 20 R.E. 2019.. "

The appellant who is the owner of the lorry (and for that matter the employer of Silvester Zacharia) came to court and filed the application under sections 351(2) and 392A (2) of the CPA seeking release of the lorry. He never cited any provision from the Proceeds of crime Act which appears to have come to him as an afterthought. I will not talk of that law. I will limit myself to the CPA. Section 392A (2) of the CPA carry the procedure

of filling applications to the court and courts subordinate to it which apply the CPA. That is by way of chamber application supported by an affidavit. This is a new provision which came to bridge the gap which appeared in the CPA. It was fully complied with for the applicant came by filling a chamber application supported by an affidavit. Section 351(2) provides the circumstances under which the court may make orders in respect of property forfeited or confiscated under section 351(1) of the CPA. It is reproduced for easy of reference as under:

*'(2) Whether the court orders the forfeiture or confiscation of any property as provided in subsection (1) of this section **but does not make an order for its destruction or for its delivery to any person**, the court may direct that the property shall be kept or sold and that the property or, if sold, the proceeds thereof shall be held as it directs until some person establishes to the court's satisfaction a right thereto; but if no person establishes such a right within six months from the date of the forfeiture or confiscation, the property or the proceeds thereof shall be paid into and form part of the Consolidated Fund'* (underlined added).

Reading through, I have noted that Mr. Magige is correct. I agree with him. This statutory provision is clear. It speaks of a situation whether the court ordered the forfeiture or confiscation of property as provided in subsection

(1) but *did not make an order for its destruction or for its delivery to any person*. In such a situation, the court may direct that the property to i) be kept or ii) sold. And where it is kept/sold, the court may direct the property/proceeds to be held until when someone establishes to the court's satisfaction to be the owner. The law stress that the person must come within six months from the date of the forfeiture or confiscation order. It adds that, the property or the proceeds thereof shall be paid into and form part of the Consolidated Fund at the expiration of six months. The law, in my view, do not give room for the person to lodge his application where there an order for forfeiture or confiscation to the government. He can only do so where there is an order for forfeiture or confiscation without a direction for it to go to the government.

In this case, there is no doubt that the court ordered confiscation of the lorry to the government. The lorry was sent to the government and is now under the hands of the government. That in effect means that, the lorry as of now, wherever it may be, it is under the control and possession of the Treasury Registrar who is the custodian of government assets

If the lorry is now in the hands of the government through the court order, section 351(2) of the CPA, in my view, cannot assist the applicant because the property has already been delivered to a person (the government). With respect to the counsel for the applicant, the court having made the confiscation order and directed the lorry to pass to the government under the confiscation order on account of it being involved in facilitating the commission of the crime, it had no power to vacate the order because it was already fuctus officio. The remedy, in my view, was not to return to the district court and file the application, but to come to this court by way of revision, if the applicant had reason to believe that there was an illegality in the matter. But he should also clear himself that he did not send the driver for he who comes to equity must come with clean hands. The driver must also come and participate in the proceedings to allow the court to arrive at a fair hearing. He should not hide himself as was done in this case. It is during the revision where the procedure adopted to confiscate the lorry to the government can be questioned.

In the same reasoning, this court, sitting to entertain an appeal against the ruling in Misc. Criminal Application No. 1/2021 of Kigoma District Court cannot question the procedure adopted in confiscating the lorry because

that ruling did not make any confiscation order. It only refused to set aside the order. The confiscation order can only be questioned by this court in the course of hearing an appeal or revision against the order which is not the case here.

That said, the appeal is found to be devoid of merits and dismissed.

It is ordered so.



A handwritten signature in blue ink, appearing to be "L.M. Mlacha", written over a horizontal line.

L.M. Mlacha

Judge

13/5/2022

Court: Ruling delivered to the parties through the virtual court services. Mr. Michael Mwangati advocate for the appellant and Mr. Robert Magige state attorney for the respondent Republic received it from their respective offices here in Kigoma. Right of Appeal explained.



A handwritten signature in blue ink, appearing to be "L.M. Mlacha", written over a horizontal line.

L.M. Mlacha

Judge

13/5/2022