



**Warsame v Director of Public Prosecutions & another (Criminal Appeal E057 of 2022) [2024] KECA 1854 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1854 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CRIMINAL APPEAL E057 OF 2022  
MA WARSAME, LA ACHODE & WK KORIR, JJA  
DECEMBER 20, 2024**

**BETWEEN**

**ABDI AZIZ MOHAMED WARSAME ..... APPELLANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**KENYA REVENUE AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the ruling of the High Court of Kenya at Eldoret (S.M. Githinji, J.) dated 3rd December 2019 in Petition No. 34 of 2019)*

**JUDGMENT**

1. By an application dated 29<sup>th</sup> August 2019 in Petition No. 34 of 2019, the appellant, Abdi Aziz Mohamed Warsame, moved the High Court at Eldoret seeking conservatory orders to stay the execution of an order issued on 30<sup>th</sup> July 2019 by Emily Kigen, the then Senior Resident Magistrate, in Eldoret CMCCRC No. 3609 of 2018. The order was for the forfeiture of Supermatch cigarettes worth Kshs. 34,950,000.00 to the 2<sup>nd</sup> respondent, Kenya Revenue Authority (KRA). The appellant's grievance was that the order infringed his constitutional rights guaranteed under Articles 27, 40 and 50 of *the Constitution*. The appellant also sought a declaration that sections 215(1) and 217(1) of the East Africa Community Customs Management Act (EACCMA) were unconstitutional.
2. The application was opposed by the 1<sup>st</sup> respondent, the Director of Public Prosecutions (DPP), and the 2<sup>nd</sup> respondent. They asserted the constitutionality of sections 215(1) and 217(1) of EACCMA and urged that the learned magistrate did not misapprehend the law in her ruling. In a ruling delivered on 3<sup>rd</sup> December 2019, S. M. Githinji, J. dismissed the petition.
3. The appellant has now moved this Court and in his amended memorandum he raises 10 grounds of appeal which we condense as follows: that the learned Judge erred in not finding that sections 215(1)



and 217(1) of EACCMA offended the rights to property, hearing and judicial discretion thus violating Articles 40, 50 and 159 of *the Constitution*; that the learned Judge erred in failing to find that sections 215(1) and 217(1) of EACCMA conflicted with section 389A(2) of the Criminal Procedure Code; that the learned Judge erred in not finding that the petition raised matters that affected the general public and hence could be considered under Article 258 of *the Constitution*; and that the learned Judge erred in failing to be guided by Article 259 of *the Constitution* which required him to construe *the Constitution* in a manner that promoted its values, purpose and principles.

4. When this appeal came up for hearing on 25<sup>th</sup> June 2024, learned counsel Mr. Mua Wambua appeared for the appellant while learned counsel, Mr. Thuo appeared for the 1<sup>st</sup> respondent. Learned counsel, Mr. Chelashaw, and Mr. Tum appeared for the 2<sup>nd</sup> respondent. Counsel made oral highlights of the filed written submissions.
5. In the submissions dated 20<sup>th</sup> June 2024, Mr. Mua Wambua pointed out that from the evidence adduced before the trial court, it was clear that the appellant had been mentioned as the owner of the seized goods. Counsel submitted that in the circumstances, the trial magistrate ought to have accorded the appellant an opportunity to be heard by asking him to show cause why the cigarettes should not be forfeited to KRA. Counsel argued that the failure to issue a notice to show cause infringed on the appellant's rights to a fair hearing guaranteed by Article 50 of *the Constitution*. Counsel also faulted the procedure adopted in the forfeiture and the interpretation of section 215(1) of EACCMA by the trial magistrate and the learned Judge urging that their actions infringed on the appellant's right to property under Article 40 of *the Constitution*. According to counsel, since section 215 of EACCMA did not provide for the procedure of forfeiture, the Court ought to have resorted to section 389A of the Criminal Procedure Code. Counsel also took issue with the mandatory forfeiture under section 215 of EACCMA arguing that the same went against the Judiciary Sentencing Policy Guidelines by taking away the discretion of trial courts. Counsel argued that by failing to issue the appellant with a notice to show cause why the goods should not be forfeited, the trial court violated the appellant's right to equality and freedom from discrimination as protected under Article 27 of *the Constitution*. Counsel relied on the High Court decision in *KRA vs. Joseph Namwai Lotiki & 2 others; ODPP (Interested Party) [2022] eKLR*, to urge that the trial court was not functus officio in the matter until it had dispensed with the show cause notices. Counsel also relied on the case of *Aden Issak Ibrahim vs. Republic [2016] eKLR*, in support of the proposition that where the owner of the goods is not the person charged, there is need to issue a notice to show cause to the owner of the goods. Finally, counsel submitted that sections 215(1) and 217(1) of EACCMA were unconstitutional as they went against the spirit and purpose of Articles 40 and 50 of *the Constitution* and that the provisions should be interpreted in consonance with *the Constitution*.
6. The respondents filed joint submissions dated 21<sup>st</sup> June 2024. The respondents submitted that pursuant to the provisions of section 217(2) of EACCMA, the only avenue available to the appellant for challenging the forfeiture decision was by way of an appeal to the High Court. It is thus their submission that the High Court had no jurisdiction to determine the propriety of the forfeiture through a constitutional petition. Still pursuing the submission that the High Court lacked jurisdiction to determine the constitutional petition, counsel submitted that the appellant ought to have exhausted the statutory mechanism provided by section 217(2) (c) of EACCMA for challenging the forfeiture before approaching the High Court. Reliance was placed on the Supreme Court decision in *United Millers Limited vs. Kenya Bureau of Standards & 5 Others [2021] KESC 72 (KLR)*, in support of the proposition that even where superior courts had jurisdiction to determine profound questions of law, the first opportunity should be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute. While acknowledging the delay in disputing the jurisdiction of the High Court, counsel relied



- on the Supreme Court decision in *Dina Management Ltd vs. County Government of Mombasa & Others* [2023] KESC 30 (KLR), to urge that the question of jurisdiction being a fundamental one can be raised at any time, including on appeal.
7. Turning to the question of the constitutionality of sections 215 and 217 of EACCMA, counsel relied on the case of *Katiba Institute & Another vs. Attorney General & Another* (2017) eKLR, to urge that there was a presumption that all statutory provisions were constitutional and that the Legislature in passing EAMCCA was alive to Article 39(2) of the Protocol on the Establishment of the East African Customs Union which required uniformity of custom laws amongst all East African Community member states. Counsel referred to the cases of *National Assembly of Kenya vs. Kina & Another* [2022] KECA 548 (KLR) and *Seventh Adventist Church (East Africa) Ltd vs. Minister for Education & 3 Others* [2017] eKLR, as setting the threshold and the test for challenging the constitutionality of statutory provisions and submitted that the appellant's petition did not meet the set standard.
  8. In rejecting the appellant's claim that his right to property was violated, counsel asserted that the right to property was not amongst the non-derogable rights listed in Article 24 of *the Constitution* and the right could therefore be limited by law. According to counsel, the goods having been found to have unlawfully entered the country, were by dint Article 40 (6) not protected by *the Constitution*. Counsel also held the view that the limitation was justified as the appellant had, himself, breached Article 201 (b) of *the Constitution*, which required the tax burden to be fairly shared by all Kenyans.
  9. Regarding the appellant's claim that his right to fair hearing under Article 50 of *the Constitution* had been infringed, it was counsel's submission that the forfeiture was pegged on an elaborate judicial hearing hence it was not arbitrary.
  10. Finally, it was counsel's submission that the appellant had not placed any evidence on record to assert his ownership over the forfeited goods, hence the findings of the learned Judge should remain undisturbed. Consequently, counsel urged that we dismiss the appeal with costs.
  11. We have reviewed the record of appeal and the submissions in line with our mandate as a first appellate Court as provided under rule 31 (1) (a) of this Court's Rules, 2022 and elaborated by the Court in *Abok James Odera T/A A. J. Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR. In line with the cited rule and decision, our mandate is to reassess the evidence afresh in order to reach our independent decision. In our view, what arises for determination is whether section 215(1) of EACCMA provides for mandatory forfeiture of condemned goods; whether the provisions of sections 215(1) and 217 (1) of the EACCMA are unconstitutional; and, whether the appellant is entitled to the forfeited goods.
  12. While rendering ourselves in this appeal, we are cognizant that what is before us is an appeal against the petition filed in the High Court and not an appeal arising out of the proceedings before the Magistrate's Court in Eldoret CMCRC No. 3609 of 2018. Our determination will therefore be limited to matters canvassed before the High Court. Having said the foregoing, the first issue we address is whether section 215(1) of EACCMA provides for mandatory forfeiture of condemned goods. A rehash of the genesis of the dispute is necessary. In Eldoret CMCRC No. 3609 of 2018, one, Elisha Korir was charged with the offence of conveying un- customed goods contrary to section 199 (b) as read with section 199 (iii) of EACCMA. Upon conviction, Elisha Korir was fined Kshs.50,000.00, in default to serve 12



months imprisonment. The magistrate, as was expected of her, brought into operation section 215 (1) of EACCMA as required by section 199 (iii) of EACCMA. Section 199 (iii) provides that:

“In the case of the person in charge of a vehicle, to a fine not exceeding five thousand dollars and the vehicle and goods in respect of which such offence has been committed shall be liable to forfeiture.”

13. Section 215 (1) on the other hand, is couched in the following words:

“215.

(1) Where any person is prosecuted for an offence under this Act and anything is liable to forfeiture by reason of the commission of the offence, then the conviction of the person of the offence shall, without further order, have effect as the condemnation of the thing.”

14. The appellant’s contention is that section 215 (1) denies the trial magistrate the element of discretion in sentencing. At the centre of the dispute is the interpretation of the words “shall” and “liable” as used in sections 199 (iii) and 215 (1). In *Caroline Auma Majabu vs. Republic* [2014] eKLR, this Court considered the words “shall” and “liable” as used in section 4(a) of the Narcotic Drugs and Psychotropic Substance Control Act and concluded that:

“In our view, the word “shall” is used in relation to the guilt of the offender and the word used in relation to the sentence is “liable”. The Concise Oxford English Dictionary 12<sup>th</sup> Edition defines the word “liable” as:

- “(i) Responsible by law, legally answerable, (liable to) subject by law to;
- ii. (Liable to do something) likely to do something;
- iii. (Liable to) likely to experience (something undesirable)

Black’s Law Dictionary defines “liable” as Responsible or answerable in law; legally obligated, Subject to or likely to incur (a fine, penalty etc.)

Applying the above definition, the use of the word “liable” in section 4 (a) of Narcotic Drugs and Psychotropic Substance Control Act merely gives a likely maximum sentence thereby allowing a measure of discretion to the trial court in imposing sentence with the maximum limit being indicated. It should be noted that sentencing is an exercise of judicial discretion, and therefore provisions which provide for mandatory sentence compromise that discretion, and are the exception rather than the rule. Thus, where applicable the mandatory sentence must be expressed in clear and unambiguous terms.”

15. Similarly, in *Mohamed Famau Bakari vs. Republic* [2016] eKLR, the Court still dealing with section 4 (a) of the Narcotic Drugs and Psychotropic Substance Control Act reiterated that:

“This Court ... has reiterated that the word “liable” in section 4(a) of the Act merely provides for a likely maximum sentence and allows a measure of discretion to the court in imposing a sentence with a maximum limit being indicated.”

16. Importing the rationale above to the interpretation of section 199



- (iii) of EACCMA, it follows that the words “shall be liable to” as used therein leaves the trial court with the discretion to determine, based on the evidence placed before it, what course of action to take. In other words, the trial court is left with the discretion as to whether to forfeit the vehicle and goods or not. The provision is not couched in mandatory terms.
17. In the circumstances of this case, section 215 (1) could only be invoked once section 199 (iii) had come into play. The two provisions must be read and construed in unison and as complementing each other. As we have already stated, the decision of whether to forfeit or not under section 199 (iii) of EACCMA is left in the hands of the trial court. That being the case, then section 215 (1) of EACCMA cannot be construed in a manner that takes away such a discretion from the trial court. In our view, the effect of section 215 of EACCMA is that upon conviction, there is no need for other proceedings to have the “goods liable to forfeiture” condemned. The law as it were, deem the goods or vessel conveying the goods as condemned upon conviction of the person found with them. The conviction would be sufficient for that purpose save for where a person moves the court seeking to have the “goods liable to forfeiture” to be released. In such an instance, the trial court is dutybound to consider and decide the fate of the application by a person so interested in the goods. It is only through this route that the discretion under section 199 (iii) of EACCMA would be properly exercised.
18. Having established the foregoing, the appellant’s other contention is that section 215 (1) of EACCMA does not provide for the procedure of forfeiture. This submission is correct. In that case, the fallback provision available to the trial court is section 389A of the Criminal Procedure Code (CPC) which provides as follows:

“389A. Procedure on forfeiture of goods:

1. 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 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.” [Emphasis ours]

19. Even as section 389A of the CPC becomes the fallback provision on forfeiture proceedings, we must appreciate that whereas the CPC provides for the general procedure in criminal proceedings, the primary Act concerning the offence which led to this petition was the EACCMA. In our view, and as we have already stated, a conviction is sufficient to warrant a condemnation of “goods liable to forfeiture”. However, there is an exception where another person steps forward to claim the condemned goods which allows for the exercise of discretion. It is in the exercise of that discretion that the trial court will then resort to the procedure prescribed by section 389A of the CPC.
20. In our view, pursuant to section 215 of EACCMA and section 389A of the CPC, the trial court will be called upon to exercise its discretion in two ways. The first one is where a person interested in the goods makes an application to the court seeking to show cause why the goods should not be condemned. The second one is where the trial court on its motion and based on the evidence before it, causes a notice to show cause to be served on a person believed to be the owner of the goods. For the second option to apply, the identity of a person believed to be the owner of the goods must be ascertainable on the face of the evidence before the court. We will come back to this aspect later in this judgment.
21. The next issue for determination is whether sections 215 (1) and 217(1) of EACCMA or any one of them is unconstitutional. We have already reproduced section 215 (1) in this judgment.

Section 217 (1) on its part provides that:

“217.

- (1) Where anything has been seized under this Act, as being liable to forfeiture, then the condemnation of the thing shall in no way be affected by the fact that any owner of the thing was in no way concerned with the act which rendered the thing liable to forfeiture.”

22. The appellant contends sections 215 (1) and 217 (1) contravene his rights as protected by Articles 27, 40 and 50 of *the Constitution*. With regard to Article 27 of *the Constitution*, the appellant contends that by being denied a chance to show cause, the law discriminated against him. In respect to Article 40 of *the Constitution*, he argues that sections 215 and 217 of EACCMA are couched in a manner that arbitrarily denies him the right to property. Additionally, he asserts that the interpretation adopted by the learned Judge and the trial court denied him the right to fair hearing under Article 50 of *the Constitution*. In response, the respondents maintain that the impugned provisions are constitutional and that the condemnation of the forfeited goods was subject to elaborate judicial proceedings. They also contend that Article 40 (6) of *the Constitution* allows for limitation of the right to property. It was further their view that the appellant had not met the threshold for declaring statutory provisions unconstitutional.
23. In *National Assembly of Kenya vs. Kina & Another* (supra), this Court stated the test for considering whether the differentiation introduced by legislation complies with Article 27 of the Constitution by holding that:

“There are three tests that require to be met by legitimate differentiation that are derived from the provisions of article 24. Firstly, the rationality test, under which there must be a legitimate purpose for the differentiation, and reasonable connection between the differentiation and its purpose. If the answer to this test is affirmative, then one moves to the second test, namely, the proportionality test, which is implied by the provisions of



paragraphs (a) to (e) of article 24(1). Under the second test, the question asked is whether the differentiation is proportional, namely is it to the extent necessary...

The third and final test is whether the differentiation is necessary in an open and democratic society. If the answer to any of these tests is negative, then it means that the differentiation is discriminatory, or a limitation of a right or freedom is not constitutional.”

24. Similarly, in *Seventh Adventist Church (East Africa) Ltd vs. Minister for Education & 3 Others* [2017] eKLR, this Court held that:

“While Article 19 (3) (c) recognizes that the rights and fundamental freedoms in the Bill of Rights are only subject to the limitations contemplated in *the Constitution*, Article 25 identifies only four rights and fundamental freedoms that cannot be limited. It follows that by Article 24 the rest of the rights and fundamental freedoms under the Bill of Rights are enjoyed and guaranteed subject to strict terms of limitations. First, it must be demonstrated that the limitation is imposed by legislation, and even then, only when it is shown that the limitation is reasonable and justifiable in an open democratic society. Further, it must be based on dignity, equality, and freedom, taking into consideration the nature of the right or fundamental freedom sought to be limited, the importance of the purpose of the limitation, its nature and extent, the enjoyment by others of their own rights as well as a consideration whether there are less restrictive means to achieve the purpose.”

25. Guided by the cited authorities, we find that the provisions of sections 215 (1) and 217(1) of EACCMA do not discriminate against the appellant. They allow for assertion of one’s rights in relation to the goods or vessel liable to forfeiture. The law as we understand it, did not treat the appellant differently from the person who was charged and convicted for being in possession of the goods. As already demonstrated, the law allowed the appellant to step forward and give reasons why the goods should not be condemned. Be that as it may, we must also state that the right to equality in itself does not bar the State from treating differently diverse groups of people. If we were to subject the alleged or perceived differential treatment under the said provision to the rationality test, sections 215 and 217 of EACCMA would still pass muster. For instance, in the circumstances of this case, the appellant was the owner of the un-customed goods. He was aware that the goods were un-customed. The owner of the lorry which was ferrying the goods probably was not aware that the goods his driver had gone to transport were un-customed. That may explain why the offence related to a person in charge of a vehicle conveying un-customed goods which resulted in the prosecution and conviction of the driver.
26. We will address the alleged infringement of Article 40 together with the assertion that Article 50 of *the Constitution* was violated. The appellant submitted that the provisions of sections 215 (1) and 217(1) of EACCMA infringe on the right to property. The appellant has failed to appreciate the fact that under Article 40 (6) of *the Constitution*, the “rights under this Article do not extend to any property that has been found to have been unlawfully acquired.” The question then is whether the goods were lawfully within the Kenyan territory. A hearing was conducted in the criminal case. During the said hearing, nothing barred the appellant from adducing evidence to confirm that the seized goods were not un-customed. Even before the High Court when addressing the petition, the appellant did not tender such evidence to bring the goods within the “lawfully acquired goods” concept. The compliance of the goods with the tax laws of the land remains a mystery to date. It is therefore our view that the appellant cannot claim infringement of his right to property in the circumstances of this case.
27. In relation to the right to a fair hearing, the appellant contends that he was denied an opportunity to register his interests in the goods. On this ground, as we have already pointed out, section 215(1) of EACCMA and section 389A of the CPC provides for an elaborate procedure which was available to



the appellant. Additionally, we agree with counsel for the respondents that under section 217 (2) (c) of EACCMA, the appellant also enjoyed the right of appeal against a decision arising out of the hearing pursued under section 215(1) of EACCMA as read with section 389A of the CPC.

28. The final issue is whether the appellant established ownership of the Supermatch cigarettes worth Kshs.34,950,000.00. The appellant’s counsel contends that there was evidence that the appellant was present during the verification and inventory of the seized goods and the trial court ought to have taken note of this evidence and issued a show cause notice to him. As we already pointed out, this is an appeal against the petition filed in the High Court and not an appeal arising and flowing from the decision of the learned magistrate in Eldoret CMCCRC No. 3609 of 2018. In such circumstances, we find that despite the appellant asserting that the goods belonged to him, before the High Court, he did not tender any documents to support this assertion. Instead, the appellant relied on the ruling of the magistrate. We think the appellant was desirous of faulting the learned magistrate. However, as we have already pointed out, there were two avenues available to the appellant to affirm his ownership and the legality of the goods that were seized. Neither of those procedures was pursued by the appellant. We therefore decline to make a finding on this issue, as it does not fall for our determination in this appeal.
29. From the foregoing, the fate of this appeal is inevitable. The same is for dismissal and is hereby dismissed.
30. On the question of costs, we note that even though costs follow the event, this is a case that pitted a citizen against the taxman. It was designed as a constitutional petition and has raised issues relating to the interpretation of some statutory provisions. In the circumstances, it is only just and fair that the parties bear their own costs of the proceedings and we so order.

**DATED AND DELIVERED AT NAKURU ON THIS 20<sup>TH</sup> DAY OF DECEMBER 2024**

**M. WARSAME**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

I certify that this is a True copy of the original

Signed

**DEPUTY REGISTRAR**

