**Ugali Products Ltd v Republic**

**Division:** High Court of Kenya at Mombasa

**Date of judgment:** 25 October 1974

**Case Number:** 59/1974 (121/74)

**Before:** Sir Dermot Sheridan J

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*[1] Criminal Practice and Procedure – Forfeiture – Maize – Notice under Criminal Procedure Code*

*must be given – Maize Marketing Act* (*Cap.* 338)*, s.* 43(*K.*) *– Criminal Procedure Code s.* 389*A* (*K.*)*.*

**JUDGMENT**

**Sir Dermot Sheridan J:** Ugali Products Ltd., the petitioner, claim to be the owner of 144 bags of maize meal which was ordered to be forfeited to the State on 15 August 1974 by the district magistrate, Voi when he convicted Wachira Kariuki, on his plea of guilty, of contravening an order made under s. 24 (1) of the Maize Marketing Act (Cap. 338), contrary to s. 24 (2) of the Act. The particulars of offence alleged:

“*WACHIRA KARIUKI*: on 15 August 1974 at 4.30 a.m. on Ndii on main MSA/NBI road in Taita/Taveta

District within the Coast Province, contravened paragraph 5 of the Maize Marketing (Movement of Maize

Products) order an order made under section 24 (1) of the Maize Marketing Act (Cap. 338) by moving 144 bags of maize meal (Maize Products) weighing 12,960 Kilograms between the hours of 6.30 in the evening and 6.30 in the morning other than by train or vessel operated by the East African Railways Corporation that is to say moving in a motor vehicle registration KJL 367 at 4.30 a.m.”

In addition to the order of forfeiture the magistrate fined the accused Shs. 1,000/- or 6 months’ imprisonment in default of payment.

In his allocutus the accused stated that he was the driver of the vehicle carrying the maize meal.

Although the magistrate did not specify the power which enabled him to forfeit the maize meal it must be presumed that he was acting under s. 43 of the Act which provides:

“43. On any conviction for an offence under this Act or under any regulations made thereunder, the court may, in addition to any penalty otherwise imposed–

( *a*) order that any maize or maize products in respect of which the offence was committed be forfeited to the Board, or, where the maize or maize products have been disposed of so as to be unavailable for such forfeiture, that the person guilty of the offence pay to the Board an amount not exceeding the value of such maize or maize products, and

( *b*) order that anything seized, removed, detained or taken into charge under section 38, section 39 or section 40 of this Act other than maize or maize products, be forfeited:

Provided that no vehicle or vessel shall be so forfeited if the owner thereof satisfies the court that it was used in connexion with the offence without his consent or acquiescence.”

Here para. (*a*) would be the relevant provision.

Mrs. Gudka, for the petitioner, submits that as para. (*a*) of s. 43 of the Act merely empowers the magistrate to forfeit the maize meal and is silent as to the procedure to be adopted in such a case recourse must be had to s. 389A of the Criminal Procedure Code which provides:

“389A. (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 such 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 such 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) I f 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.”

Mr. Mulla, for the respondent, contrasts with para. (*a*) and para. (*b*) of s. 43 of the Act which contains a proviso that in the event of the seizure of anything other than maize or maize products under ss. 38, 49 or

40 of the Act no vehicle or vessel shall be forfeited if the owner thereof satisfies the court that it was used in connexion with the offence without his consent or acquiescence. From this Mr. Mulla argues that the omission of such a provision in para. (*a*) of the section deprives the owner of maize or maize products of any locus standi when an order of forfeiture is contemplated. I am unable to agree. Paras. (*a*) and (*b*) deal with separate matters and the fact that para. (*b*) lays down the procedure to be adopted where the owner of a vehicle or vessel carries articles other than maize or maize products which are liable to forfeiture does not mean that the owner of maize or maize products which are liable to forfeiture under para. (*a*) has no right in the matter.

Otherwise the opening words of s. 389A (1) of the Code, which are virtually all embracing, would be superfluous.

I set aside the order of forfeiture.

*Order accordingly*.

For the applicant:

*Mrs S Gudka* (instructed by *AB Patel & Patel*, Mombasa)

For the respondent:

*AA Mulla* (State Counsel)