



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO. E151 OF 2021

TITUS MATHENGE NGUYO.....INTERESTED PARTY/MOTOR VEHICLE OWNER/APPLICANT

VERSUS

REPUBLIC.....PROSECUTOR/1ST RESPONDENT

STEPHEN MWEMA MULE.....ACCUSED/2ND RESPONDENT

RULING

Application

1. The application dated 16th July 2021 was brought under Article 165 (7) of the Constitution of Kenya 2010, Section 177 (a), 362 and 364 (1) (b) of the Criminal Procedure Code, Section 20 (2) (a) & 77 of the Narcotics Drugs and Psychotropic Substance Control Act No. 4 of 1994 and all other enabling provisions of the law.
2. The Applicant seeks for orders that the Honourable Court be pleased to set aside the said ruling and order dated 8th July 2021 of the Honourable Adet V. Okello, PM in Chief Magistrate's Court at Mombasa in Criminal Case No. E625 of 2020, *R v Stephen Muema Mule* and thereafter substitute it with an order for release of motor vehicle registration number KCL 634A Toyota Vitz to the Applicant.
3. The application is premised on grounds that the Applicant has produced the log book to confirm that he is the duly registered owner of the subject motor vehicle which information has not been disputed by the prosecution. The Applicant has never been issued with a seizure notice pursuant to the provisions of Section 77 of the Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994 which provides for issuance of a seizure notice by the person seizing the property to the owner of the same as soon as possible. That the Investigating Officer can take photographs of the subject motor vehicle and have them processed in the manner authorised by the relevant regulations which will then be produced in evidence during the hearing.
4. The application is premised on further grounds that if the vehicle is released after its photographs are taken, no miscarriage of justice will be occasioned during the trial. That the accused has not yet been found guilty and/or convicted with the offence he is charged with before the trial court thus he is still presumed innocent until proven guilty. In the event the accused is found guilty, the Applicant shall still be expected to show cause why the subject motor vehicle should not be forfeited. That the Applicant is ready and willing to abide by any conditions to be set by the court prior to the release of the subject motor vehicle including producing it in court whenever required and to deposit the original log book in court pending the determination of the case.
5. The application is supported by the affidavit sworn by the Applicant, Titus Mathenge Nguyo, on 16th July 2021 that it is only fair and just that the vehicle is released forthwith to the Applicant to prevent more suffering to him and his family and more wastage to it caused by the corrosive nature of the coastal climate that will render the vehicle worthless, and such other grounds.

Response

6. The Respondent filed grounds of opposition dated 8.11.2021 in response to the Notice of Motion Application. That the application is a frivolous, vexatious and an abuse of the court process. That under Section 20 of the Narcotic Drugs and Psychotropic Substance Control Act, Motor Vehicle Reg. No. KCL 634A Toyota Vitz is liable to forfeiture in Criminal Case No. E625 of 2020 *R v Stephen Muema Mule*.
7. That under Section 177 of the Criminal Procedure Code, restitution of property can only occur when exhibits have been produced before court which the subject motor vehicle has not been produced. That it has not been shown that the Applicant is not an accomplice in the commission of the offence in Criminal Case No. E625 of 2020 *R v Stephen Muema Mule*.

8. That under the provision of Section 8 of the Magistrate's Court, are limited to redressing violations under Article 40 of the Constitution. That the said motor vehicle was used in transporting *Cannabis Sativa*, and that the Applicant did not issue a notice of claim to the Commissioner of Police as required of him under Section 77(3) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994, when he realised that he had not been served with the notice as the owner of the seized motor vehicle.

9. That the Applicant has not demonstrated the use of the said Motor Vehicle as a taxi by attaching the Public Service Vehicle License, and that the Prosecution prays that this Honourable Court does not grant the orders sought. That the 1st Respondent prays for dismissal of the application.

Applicant's Submissions

10. The Applicant submits that there is no contrary proof that the Applicant is the registered legal owner of the subject motor vehicle. The Applicant's subject motor vehicle is used for car hire services to would be clients at a fee and the income thereof applied towards amongst other expenditures in the upkeep and maintenance of himself and of his family. At the time of arrest of the accused and the subject motor vehicle, the vehicle had been hired to the accused through the Applicant's agent one Mr. Mburu. A copy of the Car Hire Contract, Annexure 3, is attached to the Supporting Affidavit sworn on 5th January 2021 filed in the trial court.

11. The Applicant submits that he had no prior knowledge that the Accused or any other Hirer would traffic drugs, carry, ferry, convey or distribute *cannabis sativa* or any other illegal items or undertake any other illegal activities using the vehicle. The Respondent have not shown that the Applicant and his agent Mr. Mburu were involved in the commission of the offence herein.

12. The Applicant submits that Section 20 (2) of the Act allow a person who was the owner of the Conveyance when it was made use of for such conveyance and who was not concerned in or privy to such use to apply to court in which any proceedings for forfeiture and condemnation of any conveyance is pending and where the court is satisfied beyond reasonable doubt it shall restore the conveyance to the owner. The Applicant thus filed the release application pursuant to the foregoing provisions of the law and had a right to be heard fairly. That despite the Applicant citing and submitting on this mandatory provision of the stated law, the trial court magistrate ignored this point and did not consider it in his ruling delivered on 8th August 2021 and this was erroneous.

13. The Applicant submits that to date, no valid notice of seizure has been given to him even after he provided proof of ownership of the subject motor vehicle. No further investigations on the case have been conducted involving him and his named agent and neither have they summoned to record their respective statements. It is further to be noted that annexure "AS1" on the said Replying Affidavit is an undated and unsigned and the same was purportedly issued to the accused and not to the Applicant. This cannot be considered as a valid seizure notice pursuant to Section 77 of the Act. The Applicant submits that the trial court ignored this crucial submission and reached an incorrect decision.

14. The Applicant submits that the 1st Respondent also contended that they oppose the application seeking the release of the vehicle because they intend to produce it as an exhibit at the trial and the same has not yet been produced and further that the trial court lacks jurisdiction to order release of the motor vehicle as the law provides that it is only when some property including a motor vehicle has been produced as an exhibit in court is then seized with jurisdiction to order disposal. The 2nd Respondent however did not specify the relevant law it was referring to, to enable the court to consider the same and for the applicant to respond appropriately to it but despite this, the trial court proceeded to wrongly rule as it did.

15. The Applicant submits that the trial court ignored the authorities cited and relied upon by the Applicant and went ahead to rely on the authority by the 1st Respondent of *Republic v Everlyne Wamuyu Ngumo* [2016] eKLR in making its decision without considering the distinctions the Applicant had raised in his submission on the said authority. The Applicant further submits that the Respondent's other reason for opposing the release of the subject motor vehicle is that they are apprehensive that if the vehicle is released, the same will not be produced in court by the Applicant when required because since the vehicle is used as a car hire and is not solely in the custody of the Applicant, at all times, the Applicant cannot give assurance of its safety or preservation. However, the 1st Respondent did not propose any conditions to be set prior to the release of the subject motor vehicle.

16. The Applicant submits that this court has jurisdiction to order the release of the motor vehicle in question or any other property whether or not the same has been produced as an exhibit in court so long as the order is justly, fairly and reasonably made to meet the ends of administration of justice and it all depends on the unique circumstances of the case. The Applicant further submits that in the instant case, they invite the court to tilt the scale of justice and weigh between 24 big rolls of *Cannabis Sativa* with a street value of Kshs. 2400 which were recovered from the Accused and which led him to being charged as against the value of the Applicant's vehicle and the financial loss he has suffered. The Applicant submits that they are guided by the Court's decision of 26th February 2021 rendered in the case of *Petroleum Institute of East Africa v Republic & 3 Others* [2021] eKLR in which by dismissing an application to set aside orders releasing a motor vehicle to the owner pending the hearing and determination of the criminal case where it was held that, "*The Applicant has failed to demonstrate prejudice if any that it will suffer in the event the subject motor vehicle is released to the 2nd Respondent upon compliance of all conditions set by the trial Magistrate and this Honourable Court. Despite the fact that the prosecution submitted that upon conviction they shall be seeking to have the motor vehicle forfeited, the 3rd and 4th Respondent have not yet been found guilty and/or convicted with the offence that they are charged with before the trial court thus they are still presumed innocent until proven guilty. In the event the 3rd and 4th Respondents are found guilty, the 2nd Respondent shall be expected to show cause why the subject motor vehicle should not be forfeited...*" Therefore, the Applicant submits that the application dated 16th July 2021 be allowed as prayed.

Respondent's Submissions

17. The Respondent submits that the 2nd Respondent in this matter used the said motor vehicle KCL 634A Vitz to ferry *Cannabis Sativa* which is a fruit of crime. The Applicant's averment that he was not aware of what the motor vehicle was used for is not a sound argument to

warrant release of the said motor vehicle. Further, Criminal Case No. E625 of 2020 *R v Stephen Muema Mule* is still pending before the trial court and the said motor vehicle is to be produced as a prosecution exhibit at trial in proving the case against the 2nd Respondent.

18. The Respondent submits that they rely on the case of *R v Mombasa Development Limited and 4 others* being High Court at Nairobi, Criminal Revision No.112 of 1988. In that case, the accused were charged with 12 charges of forgery and trading without a license with alternative charges of making false customs entry in respect of motor vehicle imported into Kenya without proper documents. The court in *Republic v Everlyne Wamuyu Ngumo* placed reliance on the above case and stated, “*In light of what I have stated in the foregoing paragraphs, I find that the trial court did not have jurisdiction to order the release of the subject motor vehicle to the accused, given that the prosecution intended to use it in proving their case against the accused person.*”

19. The Respondent submits that under Section 177 of the Criminal Procedure Code, restitution of property can only occur when exhibits have been produced before court of which the said motor vehicle is yet to be produced as an exhibit. Further, under Section 20 of the Narcotic Drugs and Psychotropic Substances Control Act, Motor Vehicle Reg. No. KCL 634A Toyota Vitz is liable to forfeiture in Criminal Case No. E625 of 2020 *R v Stephen Muema Mule* as it is a fruit of a crime.

20. The Respondent submits on the issue that the Applicant was not issued with a notice of seizure as the owner of the said motor vehicle, Section 77(3) of the Narcotic Drugs and Psychotropic Substances Control Act, an owner of seized goods to issue the Commissioner of Police with a Notice Claim. In this instance, the Applicant did not issue the notice of claim to the Commissioner of Police. The Respondent submits that the Applicant has not tendered before court any evidence to prove his allegation that he had hired out the said motor vehicle to the 2nd Respondent. That the Applicant has not produced any evidence to show that he is not an accomplice in the commission of the offence. The Respondent submits that if the said motor vehicle is released to the Respondent, the same may be interfered with. The Respondent therefore asks that the said application be dismissed and Motor Vehicle KCL 634A be held in custody until the hearing and final determination of the matter.

Analysis and Determination

21. This court has considered the Notice of Motion application dated 16th July 2021 and the Supporting Affidavit thereto, the 1st Respondent’s Grounds of Opposition dated 8th November 2021, and the Applicant’s and 1st Respondent’s submissions thereto as well as the legal provisions that the application was brought under. The issue for determination is whether the Applicant made a case for grant of the order sought in the application.

22. The Applicant submitted that the subject motor vehicle was used for car hire services and at the time of arrest of the accused, the subject motor vehicle had been hired to the accused. A copy of the Car Hire Contract, Annexure 3, is attached to the Supporting Affidavit sworn on 5th January 2021 filed in the trial court. Further, the Applicant produced the log book and a National Identity card as Annexure 2 and 1 respectively to confirm that he is the duly registered owner of the subject motor vehicle, which information has not been disputed by the prosecution. The Applicant further submitted that he had no prior knowledge that the Accused or any other hirer would traffic drugs, carry, ferry, convey or distribute cannabis sativa or any other illegal items or undertake any other illegal activities using the vehicle. However, the Respondent submitted that the Applicant did not produce any evidence to show that he is not an accomplice in the commission of the offence.

23. This court finds that the proof produced by the Applicant is sufficient to show that he is the owner of the vehicle and that he hired it out to the accused as confirmed in the ruling delivered by Hon. Adet on 8.7.2021. It is the responsibility of the prosecution to show that the Applicant was an accomplice in the commission of the offence as he who alleges must prove. The prosecution having failed to do so, the subject motor vehicle ought to be restored to the Applicant who is the person entitled thereto.

24. **Section 177 (a) of the Criminal Procedure Code** provides as follows:-

“Where, upon apprehension of a person charged with an offence, any property is taken from him, the court before which he is charged may order that the property or a part thereof be restored to the person who appears to the court to be entitled thereto, and, if he be the person charged, that it be restored either to him or to such other person as he may direct.”

25. However, in the Grounds of Opposition, the 1st Respondent stated that restitution of property under Section 177 of the Criminal Procedure Code can only occur when the exhibit have been produced before court which the subject motor vehicle has not been produced.

26. A contrary position to the above was held in the case of *Republic v John Nganga Mbugua [2014] eKLR* that:-

“It does not make any sense to keep the vehicle of the applicant which is an income generating asset in police custody until the pending criminal case is finalized. The prosecution have not attempted to demonstrate to this court why the vehicle should continue to be detained at the police station while the applicant is ready and willing to produce it during hearings.”

27. Further, in the case of *Jeremiah Kobia Munoro v Republic [2021] eKLR*, the court held that:-

“... a motor vehicle parked in an open yard and unprotected from the hazards of the weather is prone to serious damage and depreciation.”

“It will not serve the interest of justice to, eventually release a “shell” to the rightful owner at the end of trial. It may even expose the state to litigation, if at the end of the trial, there is no proof of that the motor vehicle was bought with proceeds of crime or no value is given to the complainant, if it is found to have been bought as such and yet it has completely depreciated

in value.”

28. The Applicant submitted that the subject motor vehicle is used for car hire services for a fee and the income thereof applied towards amongst other expenditures in the upkeep and maintenance of himself and his family. The Applicant is also willing to deposit the original log book in court which is a demonstration that he will not deal with the subject motor vehicle in a manner prejudicial to the fair trial. Additionally, he is ready to abide by conditions set by court upon release of the motor vehicle.

29. In conclusion from the foregoing and in the interest of justice, this court finds that the Applicant’s application has merit and it is therefore allowed. The Investigating officer is ordered to take photographs of Motor Vehicle Registration No. KCL 634A Toyota Vitz and have them processed for production in evidence during the trial hearing. Motor Vehicle Registration No. KCL 634A Toyota Vitz is hereby ordered to be released to the Applicant subject to the conditions that the Applicant shall deposit the original log book in court pending the trial and determination of the case, and the subject motor vehicle shall be produced in court during trial of the case before the magistrate’s court. The Applicant shall also attend all court hearings as a sign that he is not breaching.

Dated, signed and delivered in Open Court/online through MS TEAMS,

This 28th day of **January 2022**

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

Ms. Adagi for Applicant – present online

Mr. Mulamula for 1st Respondent - present

Mr. Okuthe for 2nd Respondent – No appearance

HON. LADY JUSTICE A. ONG’INJO

JUDGE