



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MERU**

**MISCELLANEOUS CRIMINAL APPLICATION NO. E009 OF 2022**

**IN THE MATTER OF**

**AN APPLICATION TO OPPOSE RELEASE OF MOTOR VEHICLE EXHIBIT**

**DIRECTOR OF PUBLIC PROSECUTION .....APPLICANT**

**VERSUS**

**IBRAHIM ASALA MAHANGWA .....1<sup>ST</sup> RESPONDENT**

**JUMA SAFA AILA .....2<sup>ND</sup> RESPONDENT**

**ALI BISHAR MOHAMED .....3<sup>RD</sup> RESPONDENT**

**RULING**

1. This is a ruling on an application for revision of the decision of the trial court by its of Ruling 28/2/2022 ordering the release of a motor vehicle which allegedly carried narcotic drugs the subject of the trafficking charge against the accused in trial Criminal Case No. E 984 of 2021 ***R. v. Ibrahim Asala Mahangwa and Juma Safa Aila.***
2. The application for revision is set out in the letter to court (Presiding Judge dated 4/3/2022 in terms as follows:-

**“Date:4th March 2022**

***When Replying please quote Our Ref:***

***ODPP / ISO / GEN/2022(7)***

***The Presiding Judge,***

***Meru High Court,***

***Meru Law Courts***

**MERUKENYA**

***Your Lordship/Ladyship,***

***RE: REVISION OF ISIOLO CRIMINAL CASE NO E984 OF 2021-***

***REPUBLIC VS IBRAHIM ASALA MAHANGWA,JUMA SAFA AILA***

***{APPLICATION BY ALI BISHAR MOHAMED}***

***ACCUSED: ALI BISHAR MOHAMED***

***We refer to the above subject ma ter and Ruling of the Chief Magistrate Isiolo Law Courts (Hon. L. Mutai) delivered on 28<sup>th</sup>***

February ,2022.

The applicant herein, **ALI BISHAR MOHAMED** filed a Notice of motion Application dated 4th January, 2022 seeking the immediate release of motor vehicle registration number KCH 845T to the applicant.

The court made a ruling on the above application on 28th

February, 2022 granting the orders requiring the state to comply with the orders within three (3) days hence the **urgency of this application.**

- a) That the motor vehicle in question is a crime scene and its only the investigating officer that has the legal mandate to be the custodian of exhibits
- b) That the release of the motor vehicle to the applicant herein will compromise the safety of the exhibits;
- c) That there cannot be joint ownership or custody of exhibits that yet to be produced in court.
- d) That the court failed to appreciate the need to preserve, protect and safeguard both the exhibits and the crime scene in this case.
- e) That the motor vehicle is a mobile machine/vessel that is susceptible to wear, tear and in the event of an accident or being stolen the prosecution's case will be substantially affected and thus will affect the outcome of the case.
- f) That by granting the said orders, the court interfered with the chain of custody of the exhibits which is prejudicial to the prosecution case;
- g) That the impugned court orders dated 28<sup>th</sup> February 2022

**The purpose of this application for revision is to invoke the powers of this Honorable Court under section 362 and 364 of the Criminal Procedure Code, Cap. 75 Laws of Kenya and prays for: -**

1. Stay of execution of court Orders dated 28th February, 2022
2. That this Honorable Court be pleased to call for the court record in Isiolo Criminal case No. E984 of 2021 and review, vacate and/ or set aside the order for release of the exhibits motor vehicle KCH845 T
3. That this Honorable court be pleased to grant preservatory orders of exhibits and protection of the same from interference by third parties until the matter is heard and concluded.
4. Any other orders/reliefs that this court may deem fit, just and proper to grant in the circumstances.

We So pray.

**SOLOMON NAULIKHA**

**PRINCIPAL PROSECUTION OFFICER**

**FOR DIRECTOR OF PUBLIC PROSECUTIONS”**

3. In its ruling of 28/02/2022, the trial court ruled in an application by the owner of the motor vehicle and made orders for its release as follows:-

“Of importance to note is that we are not dealing with the bhang which was allegedly found in the applicant's motor vehicle the key exhibit but the motor vehicle, the object which was used to allegedly ferry the said bhang. It is also worth to mention that every person is presumed innocent until proven otherwise. I have looked at the decision in the case of John Nganga v. Republic. I have also looked at the provisions of Article 40 of Kenya Constitution 2010 and the law of innocence until proven otherwise and I find that no injustice or prejudice will be occasioned to the Respondent if the application is granted but on the following conditions to be adhered to:-

1. The Investigating Officer proceeds to photograph the bus Registration Number KCH845T within the next (2) days from the date of this ruling.
2. That the applicant to undertake not to sell, transfer and or charge the vehicle pending the hearing and determination of this case.
3. That the Court Administrator to bring to the attention of NTSA that motor vehicle shall not change title pending the hearing and determination of this case.

4. An undertaking that the motor vehicle shall be produced by the applicant whenever the matter is slated for hearing.
5. That after complying with order 3 and 4 above the OCS Isiolo Police station shall cause the release of the motor vehicle to the applicant within 2 days of this ruling.
6. That costs be in the cause.

**Hon. L.K Mutai**

**Chief Magistrate**

**28/02/2022.”**

4. In support of the application for revision the Investigating Officer Nicholas Yano of the DCI Anti-Narcotics Unit made an affidavit on 4<sup>th</sup> March 2022 in the following terms:-

“2. THAT, I am investigating a case of Trafficking in Narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994.

3. THAT, I am investigating officer conversant with the fact related to criminal case No. E984 of 2021 on a trial at chief magistrate court Isiolo.

4. THAT, the motor vehicle registration number KCH 845T make Toyota Scannia bus that belong to Mabruk Classic Moyale Raha Sacco was intercepted by multi-agency team police officers of Isiolo County on the 25<sup>th</sup> December, 2021 along Isiolo-Marsabit road.

5. THAT, upon stopping the said motor vehicle, the 1<sup>st</sup> and the 2<sup>nd</sup> respondents were the driver and the conductor respectively.

6. THAT, upon conducting search on the motor vehicle, it was found to be trafficking approximately a total of 5.735kgs of greenish dry plant material suspected to be cannabis sativa (bhang) hidden inside the

chassis compartment.

7. THAT, the 1<sup>st</sup> and the 2<sup>nd</sup> respondents could not give a satisfactory explanation of the substances found on the said motor vehicle hence they were arrested and escorted to Isiolo police station and eventually

charged with the offence of Trafficking in Narcotic drugs.

8. THAT, the said motor vehicle is an exhibit vides another criminal case No. E102 of 2020, a case of Trafficking in Narcotic drugs which was concealed on the chassis compartment thus the said bus is notorious in conveying Narcotic drugs.( Attached herein is the copy of charge sheet).

9. THAT, the 3<sup>rd</sup> respondent applied a miscellaneous application in the Chief Magistrate court at Isiolo dated SthJanuary,2022 for the released of the said motor vehicle in question.

10. THAT, the 3<sup>rd</sup>respondent has not cooperated to come to our offices to record his statement after being summoned severally.

11. THAT, in collaboration with the Drug Enforcement Agency we are investigating the 3<sup>rd</sup> respondent whether he is involved with Drug Trafficking and whether the motor vehicle is proceed of crime.

12. THAT, the motor vehicle is a crime scene and it is the investigating team can provide safe custody of the exhibit and protection.

16. THAT, this court be at liberty to issue preservatory orders for the entire exhibit from interference by third party.

13. THAT, this is an exhibit that it is yet to be produced in court.

14. THAT, any orders that will affect the chain of custody especially the motor vehicle and the S.73Skgs of cannabis sativa will be pre-judicial of the prosecution case.

15. THAT, a court order was issued by Chief Magistrate court on 2<sup>nd</sup> March. 2022 for the release of the said motor vehicle.

17. THAT, the said motor vehicle is detained at Isiolo police station and it is in safe custody and it is the interest of justice that the same remain as an exhibit.

18. THAT, I have annexed herein copies of the charge sheet order dated 02/03/2022 and motor vehicle seizure notice.

19. *THAT, if the motor vehicle is released it is likely to jeopardize the prosecution case since investigation is still on going.*

20. *THAT, the 1ST respondent IBRAHIM MAHAGWA ASALA was the driver of the said motor vehicle and seizure notice was issued to him on behalf of the owner.”*

5. In response the owner of the bus filed a Replying Affidavit principally contesting in procedure of opposing this court and that the vehicle is used in public service and that he was not the accused or perpetrator of the alleged offence and further that he was servicing a loan facility by which it was acquired by Stanbic Bank Kenya Ltd, principally as follows:-

“3. **THAT** the current application is unfounded and an abuse to the court process and an afterthought.

4. **THAT** the Applicant ought to have filed an appeal and not the current proceedings. The application is misconceived and irregular.

5. **THAT** the Applicant was heard in the trial court and they were given a fair hearing and now that they are dissatisfied with the ruling they ought to have lodged an appeal.

6. **THAT** the current nature of the proceedings is unclear as the same has been filed as a miscellaneous criminal matter.

7. **THAT** the orders of the trial court cannot be revised or be set aside by a **miscellaneous application** The orders can only be set aside through an appeal.

8. **THAT** without prejudice to the foregoing, I made an application dated 4<sup>th</sup> January 2022 which application was duly served on the Applicant. The gist of the application was for the release of motor vehicle registration number KCH 845T Scania Bus.

9. **THAT** the application was heard in open court where the Applicant was heard and court made a determination and delivered a ruling dated 28/02/2022.

10. **THAT** the ruling is legally sound and should not be subject to the current proceedings.

11. **THAT** the trial court imposed conditions on the release of the motor vehicle to ensure there is no miscarriage of justice.

12. **THAT** the Investigating officer was to photograph the motor vehicle within two days of the ruling.

13. **THAT I gave** an undertaking not to sell, transfer and or charge the motor vehicle pending the hearing and determination of the case.

14. **THAT I also** gave an undertaking that the motor vehicle shall be produced whenever the matter is slated for hearing.

15. **THAT** the court administrator also brought to the attention of the National Transport and Safety Authority that the motor vehicle shall not change title pending the hearing and determination of the case and a caveat was lodged against the dealing of the motor vehicle.

16. **THAT** all the above conditions have been complied with and therefore there is

no risk of miscarriage of justice.

17. **THAT** It is the practice in criminal cases that photographs will be taken by the scene of crime personnel of exhibits and scenes of crime which will be produced in evidence during the hearing.

18. **THAT** if the vehicle is released after its photographs are taken, no miscarriage of justice will be occasioned during the trial.

19. **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.

20. **THAT** the Applicant have not attempted to demonstrate to this court why the vehicle should continue to be detained at the police station while the Respondent is ready and willing to produce it during hearings.

21. **THAT I** Acquired the said motor vehicle through a loan facility financed and approved by Stanbic Bank Kenya Limited.

22. **THAT I** am currently financing the said loan and the same is outstanding. That the detention of the motor vehicle is prejudicial to the repayment and servicing of the debt and I am at the risk of default and the vehicle being repossessed. (Annexed hereto and marked as AA2 is a copy the loan statement showing servicing of the loan facility)

23. **THAT** the said motor vehicle is used as public service vehicle to ferry passengers and luggage between Moyale and Nairobi.

24. **THAT** On 25<sup>th</sup> December 2021 the Motor Vehicle was seized and impounded by Police Officers along the Isiolo-Moyale Highway and kept at Isiolo Police Station.

25. **THAT** the said vehicle has been lying at the said station since 25th December, 2021.

26. **THAT** I have not been charged and neither am I the perpetrator or a participant of the alleged offence.”

6. Counsel for the parties Mr. Naulika, Prosecutor Counsel, and Mr. Jarso Advocate for the Applicant (Respondent in the Revision before this court) made oral submissions and ruling was reserved. For the Applicant, loss of chain of custody and impact on ability to prove the charge and possibility of defeat of forfeiture were urged. For the Respondent owner of the bus involved in the trafficking charge, it was urged that the orders of the trial court sought to be revised herein were reasonable and will cause no miscarriage of justice, and they accorded with established practice of courts.

7. The power of the Court in revision of orders of the trial court is indubitable under section 362 of the Criminal Procedure Code as follows:

**“362. Power of High Court to call for records**

***The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”***

8. Section 364 (1) of the Criminal Procedure Code provides that this jurisdiction may be invoked by any means by which the court may be notified or made aware; and indeed, the court may call for a matter for revision where it otherwise becomes aware of a matter that requires revision to ensure legality of the process of the subordinate courts. Section 364 (1) (b) of the Criminal Procedure Code provides as follows:

***“(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—***

***(a) ...***

***(b) in the case of any other order other than an order of acquittal, alter or reverse the order.”***

9. The court does not, therefore, accept that the court could only be approached by appeal. Indeed, the applicant is not, with regard to the order for release of the motor vehicle, a person who could have appealed within the meaning of the bar in section 364(5) of the Criminal Procedure Code, as right of appeal in criminal case is granted under section 348 to the accused and the prosecution on the matter of conviction or acquittal, as the case may be. Section 364 (5) provides as follows:

***“5. When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”***

10. In my respectful view, there are 3 considerations to be made on the possible outcome of the proceedings:-

1) The accused are convicted of the offence of trafficking and the motor vehicle is forfeited in accordance with the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The vehicle must be available for forfeiture

2) The accused are acquitted of the charge of trafficking in narcotics. The determination of the motor vehicle will have cost the Applicants herein source of income and livelihood and means of repugnant of chattels mortgage on the vehicle.

3) It is in the interests of both sides of the prosecution and the accused/ owner of the motor vehicle that the true value of the Motor vehicle is retained so that sale on forfeiture or return upon determination of the Criminal trial in favour of the accused secures the value of the vehicle and avoid waste, disrepair and consequent depreciation.

11. How does the court protect the property from waste or loss of value and the interest of the owner/mortgages in the property consistency with the necessary Criminal Process? Securing the value of the property calls from the restriction of the vehicle to the owner so that he may use it to generate income to live on and pay off the mortgage. An order of the Court restricting any disposal by sale or mortgage, if possible, may be maintained as ordered by the court by a restriction placed with the National Transport and Safety Authority. Which is responsible for Motor vehicle ownership transfer registration.

12. How does the court ensure that the order it makes is fit for purpose of promoting or ensuring effective criminal prosecution of the anti-corruption offence. If the release of the motor vehicle lapses the ability of the prosecution to prove the charge of trafficking because, say, the vehicle is not available, or there is no opportunity to prove the carriage of the narcotic drug in the vehicle because of intervening interference of the vehicle, or the consequential process of forfeiture is disabled by loss of value of the vehicle or its unavailability, there would have been a misjustice in the failure of the prosecution to carry out its lawful mandate. Of course, the repeat offender argument of the Prosecution was inaccurate as the respondent bus, although involved in a previous charge for the same trafficking of narcotics, has not been found guilty as the case is still pending.

13. A balance of the prosecution’s interest in the effective prosecution of crime by enabling proof of offences and the remanding of

forfeiture as a deterrent on the one hand and the proprietary interest of the accused or the owner of the motor vehicle and the inter-locking interest of both in securing the value of the motor vehicle must be sought.

14. I consider such balance to exist in an order for the release of the motor vehicle, bearing in mind the principle of presumption of innocence on the accused, and of course, the non- involvement on the evidence, if that were so, of the Applicant owner of the motor vehicle, with a counter measure from the protection of prosecutions ability to prosecute effectively through an order that the prosecution is allowed to present such evidence relevant to the motor vehicle before the order for release is affected.

15. In other words, the trial court will afford the prosecution an opportunity to present its case against the Motor Vehicle for trafficking in the narcotics. That done, the only issue remaining is the forfeiture of the vehicle, if in the final analysis of the entire evidence of the trial, the offence is proved. The vehicle shall have been secured by the restriction on transfer or other disposal of the vehicle. If the offence is not proved, the Applicant owner of the Motor vehicle shall not have lost its use and benefit in the meantime.

16. The practice of photographing in motor vehicle which is an exhibit in a criminal or civil trial and release thereafter to the owner of motor vehicle as observed by Muchemi J. in **R. v. John Nganga Mbugua [2014] eKLR**, is correct in the circumstances of the case where as the court noted *“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.”*

17. In this case, the Prosecution’s twin fears were presented by counsel for the revision Applicant, Mr. Naulika, in observing that the release of the motor vehicle would destroy the chain for custody of the vehicle and compromise the outcome of the trial, and the motor vehicle is susceptible to wear and tear and in the event of accident there would be no exhibit to produce.

18. I think that the possibility of loss of the benefit of the exhibit by way of interference with the chain of custody and the possibility of damages wear and tear through accident is a compelling factor, which in the circumstance of this case call for the presentation of the vehicle before the court in evidence before an order for release. It is the question of forfeiture which must await in determination of the trial which does not require the physical custody of the vehicle with the court, and it may be released to the owner subject to the orders of the court upon the end of the trial, the restrictions on dealings thereof securing at least the physical loss. The court cannot insure against loss of the vehicle by loss of value on account of accident in the course of use, and the comparative benefit of use of the vehicle for the innocent until proven guilty accused or owner of the vehicle, as the case may be, would in my view out weight the loss of value of forfeiture of the motor vehicle in the end.

19. Apart from the order for presentation of the motor vehicle in evidence before the order for release, a further order for expeditious trial may also lessen the time for conclusion of the matter and determination of whether or not to forfeit, in the interests of Applicant owner, the prosecution, and the accused. The court shall impose a time line with which to present the vehicle in evidence.

## **ORDERS**

20. Accordingly, for the reason set out above, the court makes the following Orders:-

- 1) The order for the release of the motor vehicle KCH 845T made on 28/2/2022 by the trial court is revised.
- 2) The motor vehicle KCH 845T shall be presented and put in evidence as an exhibit within Thirty (30) days of this order.
- 3) Upon presentation as an exhibit, and pending determination of the trial, the vehicle shall be released to the owner with an undertaking not to transfer or otherwise dispose of the motor vehicle and to produce it on order of the court when required.

*Orders accordingly.*

**DATED AND DELIVERED 31<sup>st</sup> DAY OF MARCH 2022.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:-**

Mr. Naulikha Principal Prosecution Counsel for the Applicant DPP.

Mr. Jarso Advocate for the Respondent.