



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kirimi v Republic (Criminal Revision E097 of 2022)
[2022] KEHC 14748 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14748 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL REVISION E097 OF 2022
LW GITARI, J
OCTOBER 27, 2022**

BETWEEN

ABRAHAM MWENDA KIRIMI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Before this court is a Criminal Revision application that was brought vide the Notice of Motion application dated August 23, 2022. The application seeks the following orders:
 - 2) That the honourable court be pleased to issue an order for stay of the orders issued in Chuka Chief Magistrate Court Criminal Cases No. E488 of 2022 on 15/8/2022 for arrest of motor vehicle registration number KCF 5XXM to be detained at Chuka Police Station pending the interpartes hearing and determination of this application.
 - 3) That the honourable court be pleased to issue an order for the release of motor vehicle registration number KCF5XX M detained at Chuka Police Station pending the interpartes hearing and determination of this application.
 - 4) That the honourable court be pleased to call for and review and/or set aside the orders issued in Chuka Chief Magistrate Court Criminal Cases No.E488 of 2022 on 15/8/2022 for the arrest and detention at Chuka Police Station of motor vehicle registration number KCF 5XXN.
 - 5) That this honourable court do make any other orders it deems fit in the circumstances.
2. The application is brought pursuant to the provisions of Article 165(3), (6), (7), Article 159(1)(2), Article 50 and Article 47 of *the Constitution*, Section 362 and 364 of the *Civil Procedure Code*, and Sections 3, 4, 5, 7, and 9 of the *Fair and Administrative Action Act*, 2015 and is based on the following grounds:



- a. That the applicant was charged before Chuka Chief Magistrate's Court in Criminal Case Number E488 of 2022 with the offence of obtaining money by false pretenses on August 1, 2022 and pleaded not guilty.
- b. That when the matter came up for mention on August 15, 2022 the trial court erroneously and illegally made an order that motor vehicle registration number KCF 5XXM to be arrested and detained at Chuka Police Station without any legal or factual basis at all.
- c. That the applicant purchased motor vehicle registration number KCF 5XXN from one George Ngugi Kamau and the motor vehicle has no connection to the offence the applicant is facing in Chuka Criminal Cases NoE488 of 2022.
- d. That the applicant as the owner of the motor vehicle was not given a hearing before the said very harsh, adverse and illegal orders were issued.
- e. That the trial court had no basis for ordering the arrest and detention of motor vehicle registration number KCF 5XX N as the issue between the accused and the complainant is a loan of one million which had no connection with motor vehicle registration Number KCF 5XX N.
- f. That the applicant entered into a loan agreement with one Josphine Kairuthi for a sum of Kshs.1,000,000/- on the 25th day of January 2022 which agreement was witnessed by Dhan Sele Wako the husband to Josphine Kairuthi and the complainant in Chuka Criminal Case No.E488 of 2022.
- g. That the loan amount was to be paid in two instalments. The 1st installment of Kshs.500,000/- was to be paid on 29/4/2022 and the final installment of Kshs.500,000/- was to be paid on 29/7/2022.
- h. That the applicant stands to suffer irreparably as he cannot use his motor vehicle and yet the vehicle has a loan with Sidian Bank and the same cod even be repossessed for defaulting on loan repayments.

The application is also supported by the affidavit of the applicant sworn on 23/8/2022 where he has reiterated the above grounds.

3. The background facts of this matter, as laid out in the application, are that the Applicant was charged in Chuka Chief Magistrate Court Criminal Case No. E488 of 2022 with the offence of obtaining money by false pretenses contrary to Section 313 of the [Penal Code](#). It was alleged that on November 28, 2021 at Chuka Township Meru South Sub-County with intent to defraud obtained from Dhan Sele Wako, Kshs.1,000,000/- (One Million Shillings) by falsely pretending that he was in a position to acquire motor vehicle worth Kshs.2.5 million to the said Dhan Sele Wako, a fact he knew to be false or untrue. That the Applicant pleaded not guilty. That the matter came up for mention on August 15, 2022 and the trial court made an order that motor vehicle registration number KCF 5XXM to be arrested and detained at Chuka Police station, a decision that the Applicant considers to have been erroneously and illegally made. According to the Applicant, the said motor vehicle has no connection to the offence that he is facing before the lower court and he was not given a hearing before the impugned orders were issued.
4. In opposition to the application, the Respondent filed a Replying Affidavit sworn on October 4, 2022 by PC Joseph Ole Nampaso Kireu, the investigating officer in Chuka Chief Magistrate's Court Criminal Case No. E488 of 2022 on 15/08/2022. The said officer deposed that he was aware that motor vehicle registration number KCF 5XX FRR ISUZU was detained at Chuka Police Station after



it was impounded on 19/08/2022 vide warrants of arrest orders issued by the court on August 15, 2022. He further deposed that the warrants to detain the said motor vehicle were merited as the motor vehicle is the core substance in the complaint between the applicant and the complainant.

5. The application was heard on October 4, 2022 when counsel for the respective parties made their respective oral submissions in support of and against the application.

Analysis

6. The only issue for determination by this Court is whether this is a case where this Court should revise the orders of the trial court in Chuka Chief Magistrate Court Criminal Case No. E488 of 2022 that were issued on August 15, 2022.

7. The revisionary powers of this Court are set out in Section 362 through to Section 366 of the *Criminal Procedure Code*, Cap 75 of Laws of Kenya (the “Code”). Section 362 of the Code specifically provides that:

“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 of the same *Code* provides for the powers of the court on exercising its revisionary jurisdiction. The said Section 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) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;
- (b) in the case of any other order than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or through an advocate in his own defence.

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a Subordinate Court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.



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

9. From the above provisions, it is clear that while this Court has wide powers in exercise of its revisionary jurisdiction, the said powers are limited by a number of factors. One of the limitations to the exercise of revisionary powers by this Court is that where an appeal lies and no appeal has been filed, the party who is entitled to appeal cannot insist or maintain a cause for a Criminal Revision.
10. The exercise of the revisionary jurisdictions of the High Court is to correct manifest irregularities or illegalities and give appropriate orders or direction. These are powers conferred upon the High Court to exercise supervisory jurisdiction upon sub-ordinate courts in order to satisfy itself that the decision is in accordance with the law and that they are correct. In a persuasive decision where the Judge was considering a similar matter in *Republic –v- Everlyn Wamuyu Ngumo* (2006) eKLR while applying Section 364 (5) (*supra*), stated that order for the release of motor vehicle which the Director of Public Prosecution claimed was an exhibit in the case, held that the DPP had no right of appeal from such an order and it was therefore revisable in accordance with Section 362 *Criminal Procedure Code*.
11. The High Court to exercises revisionary jurisdiction if satisfied that any finding, sentence or order recorded or passed by the subordinate court did not meet the required standards of correctness, legality or propriety. The jurisdiction given to the High Court is supervisory as it is supposed to review the order or sentence passed and determine its correctness so as to prevent miscarriage of Justice. The jurisdiction lies in cases of all orders interlocutory or final made by subordinate courts save that an order of acquittal may not be revised to an order of conviction. That would be an order which ought to be canvassed on appeal.
12. In *Republic – v- Ajit Singh s/o Vir Singh* (1957) E.A 822 while considering Section 364(5) stated:

“The construction of this sub-section is not free from difficulty. The opening words appear to indicate that if the right of appeal had existed and if the party aggrieved has not taken advantage of that right while it existed, then proceedings by way of revision shall not be entertained at his instance.

We do not propose to say which construction is correct; nor do we propose to say whether, in the instant case, an appeal by way of case stated did in fact lie.

We are of the opinion that sub- Section 5 is not intended to preclude the Supreme Court from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who has or had a right of appeal. We do not think this sb-section is intended to derogate from the wide powers conferred by Section 361 and Section 363 (1). To hold that Subsection 5 has that effect would mean that this court is powerless to disturb a finding, sentence or order which is manifestly incorrect- for instance in the case of a conviction where no offence known to the law has been proved- merely because the aggrieved party, who might well be an ignorant person, has not exercised a right of appeal but has asked for revision and thus brought the matter to the notice of the court. In our judgment the court can, in its discretion, act sui motu even where the matter has been brought to its notice by an aggrieved party who had a right of appeal.

In our view *Chhagan Raja -v- Gordhan Gopal* (1936) 17KLR 69 merely decided that, on the facts of that particular case, the court should not make an order in revision. It emphasis that the exercise of jurisdiction in revision is discretionary.



In this case the decision was brought to the notice of the court by Crown, and the court, in exercise of its discretion, decided to call for and examine the record under the powers conferred by Section 361. “

The decision supports the submission by the applicants that the High Court’s jurisdiction for revision is not ousted by possibility of an appeal. As emphasized in the Ajit Singh and the Muhari bin Mohd Jani decisions, the court has a wide discretion to revise orders of the trial court and the discretion to be exercised on a case by case basis having regard to the different circumstances of each case.

13. The decision is to the effect that the Jurisdiction of the High Court on revision is not ousted by the fact that the party ought to have appeal the court has wide discretion to revise orders of the trial court based on the facts and circumstances of the case. The Constitution also gives this court wide supervisory powers over the subordinate court. Under Article 165(6) and (7) of the Constitution it is provided:-

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

14. The issue is therefore whether this court should exercise discretion and revise the orders herein. When it comes to the exercise of discretion by the court, it is trite that the discretion must be exercised judiciously having regard to the order which the court is asked to revise and the facts and the circumstances.

15. In this case the court is called to determine the correctness legality or otherwise of the said order and whether it has occasioned a miscarriage of justice.

The applicant contends that the order was irregularly issued as the trial court did not give the parties a chance to be heard and yet the order was harsh, adverse and illegal. From the impugned proceedings of the trial magistrate, an application was made before the trial magistrate for the detention of the motor vehicle KCF 508 N on allegation that the accused was given money to purchase it. The trial magistrate ordered that a warrant of arrest be issued for the motor vehicle KCF 508 M. That the same upon being impounded, it be detained at Chuka Police Station. Although the proceedings shows that the applicant was present before court, he was not given an opportunity to be heard before the order was issued. He was not given an opportunity to counter the application by the State.

16. The principle that a person who is to be adversely affected by an order must be given an opportunity to be heard is embedded in the Constitution. Article 50(1) of the Constitution provides as follows:-

“1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

Under Article 50(2) the Constitution makes provision for the right to fair trial which ‘*inter alia*’ gives an accused the right to be presumed innocent, until the contrary is proved, the right to adduce and challenge evidence and so on. Where a trial court issues orders without giving an accused the right to be heard, the order becomes an illegality, irregular and incorrect for violating the rights of an accused to a fair trial. The order was made before the trial magistrate heard the evidence which may lead to



the presumption that the trial court believed the prosecution even before the witnesses had adduced evidence. The order caused an injustice and grave prejudice to the applicant in view of the evidence which he has availed in this court. Section 347 and 348 A of the Criminal procedure Code provides: -

“347(1) Save as is in this Part provided - (a) a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court; and (b) (Repealed by 5 of 2003, s. 93.) (2) An appeal to the High Court may be on a matter of fact as well as on a matter of law.”

“348A(1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law. (2) If the appeal under section (1) is successful, the High Court or Court of Appeal as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately.”

17. The sections makes provision for matters upon which an appeal shall lie. There is no right of appeal against an order like the one which was issued by the trial magistrate. At the stage the order was made there was no conviction. It follows that the only re-course which the applicant had is to seek revision of the order by this court. The application for revision is therefore properly before this court.

I have considered by averments by the applicant and the State. I find that they raise many facts which the trial magistrate ought to have considered before issuing the impugned order. My view is that she ought to have given the applicant an opportunity to be heard. Failure to do so rendered the order to be irregular, and illegality and clearly incorrect.

Conclusion:

For the reasons stated above, I find that the application has merits. I allow it and order that:-

1. The order issued by the learned trial magistrate on 15/8/2022 in Criminal Case No. E488/2022 is revised and set aside.
2. The motor vehicle KCF 5XXM be released to the applicant forthwith.
3. The order be served on the OCS Chuka Police Station for compliance.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 27TH DAY OF OCTOBER 2022.

L.W. GITARI

JUDGE

27/10/2022

The ruling has been read out in open court.

L.W. GITARI

JUDGE

27/10/2022

