



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO. E001 OF 2021**

**IN THE MATTER OF CRIMINAL REVISION**

**BETWEEN**

**PETROLEUM INSTITUTE OF EAST AFRICA.....APPLICANT**

**-AND-**

**REPUBLIC.....1<sup>ST</sup> RESPONDENT**

**FIDELIS WANJIRU GICHERU.....2<sup>ND</sup> RESPONDENT**

**ERICK MWACHOME MWANGALA.....3<sup>RD</sup> RESPONDENT**

**JOHN MWENDWA.....4<sup>TH</sup> RESPONDENT**

***(Being an application for revision of the record, proceedings and order of the Honourable N. C. Adalo (SRM) of 21<sup>st</sup> December, 2020)***

**RULING**

**The Application**

1. By a Notice of Motion Application dated 4<sup>th</sup> January, 2021, brought under Article 50 (9) of the Constitution of Kenya, 2010, Section 121 and 362 of the Criminal Procedure Act, Sections 4, 9, 16, 19 & 20 of the Victims Protection Act, 2014 and Section 120 of the Petroleum Act, 2019, PETROLEUM INSTITUTE OF EAST AFRICA (*the Applicant*) prays for the following orders: -

1. **THAT** for reasons to be recorded service of this application be dispensed with in the first instance.
2. **THAT** for reasons to be recorded this application be heard *ex-parte* for purposes of prayers 3 and 4 herein.
3. **THAT** the Honourable Court be pleased to certify this application against the order of the Honourable N. C. Adalo (SRM) in Principal Magistrate's Court at Mariakani Criminal Case No. E082 of 2020 dated 21<sup>st</sup> December, 2020 (to the effect that the exhibit namely motor vehicle registration No. KCT 191 S be released) as urgent and an urgent date be set for the hearing of this application *inter partes*.
4. **THAT** this Honourable Court be pleased to stay the execution of the order of the Honourable N. C. Adalo (SRM) in Principal Magistrate's Court at Mariakani Criminal Case No. E082 of 2020 dated 21<sup>st</sup> December, 2020 (to the effect that the exhibit namely motor vehicle registration No. KCT 191 S be released) pending the hearing of this application *inter partes*.
5. **THAT** this Honourable Court be pleased call for and examine the record, proceedings and order of the Honourable N. C. Adalo (SRM) in Principal Magistrate's Court at Mariakani Criminal Case No. E082 of 2020 dated 21<sup>st</sup> December, 2020 (to the effect that the exhibit namely motor vehicle registration No. KCT 191 S be released) for the purpose of satisfying itself as to the correctness, legality, regularity and or propriety of the said Record, Proceedings and Order.
6. **THAT** this Honourable Court be pleased to set aside the Order of the Honourable N. C. Adalo (SRM) in Principal Magistrate's Court at Mariakani Criminal Case No. E082 of 2020 dated 21<sup>st</sup> December, 2020 (to the effect that the exhibit namely motor vehicle

registration No. KCT 191 S be released).

7. **THAT** this Honourable Court be pleased to order the detention and preservation of all physical and documentary evidence in Principal Magistrate's Court at Mariakani CRIMINAL Case No. E082 of 2020 (including the exhibits namely gas cylinders and motor vehicle registration No. KCT 191 S) until conclusion of the said case.

8. **THAT** the applicant be at liberty to apply for such further or other orders and/or directions as this Honourable Court may deem fit and just to grant and that the Honourable Court makes such further or other orders it deems appropriate.

9. The costs of this application be provided for.

2. The application is premised on the grounds on the face of the application and the supporting affidavit of Clive Cetewayo Mutiso (*the chief investigations and compliance officer of the applicant herein*) sworn on 4<sup>th</sup> January, 2021.

3. The applicant's case is that the 3<sup>rd</sup> and 4<sup>th</sup> respondents' were found in possession of and dealing with liquefied petroleum gas cylinders, including those owned by the members of the applicant in a manner contrary to the Petroleum Act No. 2 of 2019. That about 130 pieces of assorted liquefied petroleum gas cylinders and a motor vehicle registration number KCT 191 S were recovered and preserved as prosecution exhibits to be adduced at the trial in Principal Magistrate's Court at Mariakani Criminal Case No. E082 of 2020.

4. The applicant avers that the 2<sup>nd</sup> respondent is the registered owner of motor vehicle registration number KCT 191S Isuzu Lorry, who obtained from the Principal Magistrate's Court at Mariakani an order to the effect that the exhibit namely the motor vehicle registration number KCT 191 S be released to her. It further avers that neither the applicant nor its members were informed of and neither did it participate in the proceedings before the trial Court in violation of its Constitutional and statutory rights as a victim of the alleged crimes.

5. The applicant contended that the said exhibits are an integral part of the prosecution's evidence necessary for it in discharging their evidentiary burden of proof at the trial before the Magistrate's Court, therefore the release of the said exhibits will break the evidentiary chain of custody and negate the exhibits' probative value. It further stated that under section 120 (a) & (b) of the Petroleum Act No. 2 of 2019, the exhibits are the subject of a mandatory statutory forfeiture order should the prosecution result into a conviction of the accused persons.

6. The applicant further stated that it was clear that the record, proceedings and order of the trial Magistrate is incorrect, illegal, irregular and improper and the fair hearing of the case before the Principal Magistrate's Court at Mariakani will be prejudiced and irreparably hamstrung if the exhibits were to be released.

7. The applicants case is that it is entitled to have the record, proceedings and order before the trial Magistrate set aside *ex debito justitiae*.

8. In support of the applicant's application, the 1<sup>st</sup> respondent swore a replying affidavit by No. 60986 CPL. Jacob Mong'are (*the investigating officer*) on 1<sup>st</sup> February, 2021.

9. The 1<sup>st</sup> respondent avers that the 3<sup>rd</sup> and 4<sup>th</sup> respondents were arrested within Kokotoni area at an enclosed illegal LPG storage and refilling facility on 25<sup>th</sup> November, 2020 following a complaint lodged by Clive Cetewayo Mutiso a compliance officer from the applicant. It further avers that officers from Energy & Petroleum Regulatory Authority were present during the arrest and after establishing that the accused persons were undertaking the offences that they have been charged with, ordered for the immediate seizure of the vehicles found transporting LPG gas cylinders without a valid license and seizure of the cylinders of other brand owners found being illegally refilled.

10. The 1<sup>st</sup> respondent state that the said exhibits were escorted to DCI headquarters Nairobi for safe custody and that they are an integral part of the prosecution's evidence necessary in discharging their evidentiary burden of proof. The 1<sup>st</sup> respondent also stated that the EPRA is a government body established under the Petroleum Act and its powers as a regulator extends to the seizure of any assets and equipment found being used in contravention to the provisions of the Act and the LPG regulations, hence if the applicant wishes to challenge the seizure, then it should seek judicial review orders against EPRA in the High Court.

11. The 1<sup>st</sup> respondent further stated that Section 120 (a) & (b) provides that once the accused persons are found guilty for the offences they have been charged with all the equipment and vehicles used in the commission of the offence shall be forfeited to the government hence release of the motor vehicle will break chain of custody of material that is liable to mandatory forfeiture under the law and would pre-empt the prosecution case.

12. It also states that the proceedings and order from the trial Magistrate is improper because they were not given time to make their formal replying affidavit and that it was relied on misleading submissions.

### **The Response.**

13. The application is opposed by the 2<sup>nd</sup> respondent through a Replying Affidavit sworn on 8<sup>th</sup> January, 2021 by Fidelis Wanjiru Gicheru (*the 2<sup>nd</sup> respondent*).

14. The respondent avers that the orders sought to be stayed were issued after all the parties served with the application had been heard. That the complainant was indicated as republic through DCI-Nairobi and that was the entity which was served with the impugned application thus the issue of not being heard ought not to arise.

15. The 2<sup>nd</sup> respondent stated that her Motor Vehicle registration number KCT 191 S does transport business and it is normally operated by the 4<sup>th</sup> respondent whose duty is to submit the monthly transport business proceeds and that the said motor vehicle does not and has never been hired by any liquefied petroleum gas company to transport gas cylinders.

16. The 2<sup>nd</sup> respondent further stated that she is not one of the accused persons in Mariakani Criminal Case No. E082 of 2020 and as such her right to property as enshrined under the Constitution cannot be casually interfered with. She averred that though the statute under which the 3<sup>rd</sup> and 4<sup>th</sup> respondents have been charged provides for forfeiture, the law also recognizes the rights of the owner of any property taken at the time of apprehension to be restored to the said owner,

17. The 2<sup>nd</sup> respondent contends that the application before the trial Court was only in relation to motor vehicle registration number KCT 191 S and not the cylinders which she is not aware of their ownership. That when the lower court rendered its ruling, it fixed conditions for the release of the motor vehicle and that the applicant has not demonstrated any prejudice it stands to suffer if the motor vehicle is released at this stage. She further contended that the trial Court's decision was correct, legal, regular and proper as it was in consonance with the law.

### **Submissions.**

18. The application was canvassed through written submissions. The applicant filed submissions on **3<sup>rd</sup> February, 2021**. In its submissions, the applicant relied on the case of Simon Okoth Odhiambo v Republic [2005] eKLR and Proto Energy Limited v Republic & 7 others [2020] eKLR as regards release of exhibits by a trial Court and submitted that at paragraph 11 and 12 incorrectly considers the effect of the covid-19 pandemic on the 2<sup>nd</sup> respondent and the income generating nature of the subject motor vehicle. The applicant further submitted that the Court had the power to review the order of the Trial Magistrate in so far as it relates to the release of motor vehicle registration number KCT 191 S Isuzu Elf to rectify a potential miscarriage of justice

19. The applicant submitted that the application dated 15<sup>th</sup> December, 2020 was premised on section 177 (a) of the Criminal Procedure Code, and restitution under this section ought to occur at the end of the trial and not before. It further submitted that the 2<sup>nd</sup> respondent faced legal jeopardy by virtue of section 122 of the Petroleum Act as an employer of the 3<sup>rd</sup> and 4<sup>th</sup> respondents as well as the peril of having the subject motor vehicle forfeited under section 120 of the Petroleum Act.

20. The applicant submitted that the views of the 3<sup>rd</sup> and 4<sup>th</sup> respondent were not sought or obtained regarding the release of the said motor vehicle, the trial magistrate at paragraph 10 of his ruling incorrectly cites a practice in criminal cases that photographs are taken to substitute the physical evidence in forms of exhibits and at paragraph 2, he incorrectly states that there is no provision in the Petroleum Act, 2019 requiring forfeiture of the motor vehicle should the prosecution result in a conviction.

21. The 2<sup>nd</sup> respondent filed its submissions on 12<sup>th</sup> February, 2021. The respondents in her submissions she submitted that the complainant as per the charge sheet was served with the application and it fully participated in the hearing through the 1<sup>st</sup> respondent as such it was the 1<sup>st</sup> respondent's duty to inform the applicant of the application and get its views and that the 1<sup>st</sup> respondent did not file a response to the application in the lower Court but only submitted on issues of law.

22. The 2<sup>nd</sup> respondent referred to section 177 (a) of the Criminal Procedure Code and submitted that the said section does not specify at what point the application for release is made. She submitted that the High Court has adopted varying approaches when faced with such a scenario. She relied on the holding in the case of Francisca Akinyi v Republic [2018] eKLR where the Court held that each case must be taken on its own peculiar circumstances since no two cases are the same and the case of David Muigai Mucheru v Kenya Forest Service & Another [2012] eKLR.

23. The 2<sup>nd</sup> respondent submitted that both the applicant and the 1<sup>st</sup> respondent have not indicated what prejudice they shall suffer if the subject motor vehicle is released to the 2<sup>nd</sup> respondent conditionally. She further submitted that on 5<sup>th</sup> January, 2021 this Court issued orders which the applicant is yet to comply with to date hence a case of a party enjoying orders which requires it to do certain things and yet it does not want to do them.

### **Analysis and Determination.**

24. I have considered the issues raised on Notice of Motion, replying affidavit by the respondents and submission of parties. In my view, the issues which arise for my determination are as follows: -

**I. Whether the finding of the order of release by the trial court was rigged with illegality, irregularity, incorrectness or an error apparent to the law to warrant an application for revision.**

**II. Whether the Magistrate Court ought to have released Motor Vehicle registration number KCT 191 S to the 2<sup>nd</sup> Respondent.**

**Whether the finding of the order of release by the trial court was rigged with illegality, irregularity, incorrectness or an error apparent to the law to warrant an application for revision.**

25. Section 362 of the **Criminal Procedure Code** provides as follows:

***“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.”*

26. Section 367 of the **Criminal Procedure Code**, on the other hand, provides as hereunder:

*“When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.”*

27. A strict interpretation of section 362 of the **Criminal Procedure Code**, in my view does not limit the revisionary jurisdiction of the High Court to a finding sentence or order. The Court can also deal with interlocutory proceedings. The above cited section enables the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with.

28. In the present case, the Applicant avers that the jurisdiction of this Court to review the order of the trial Court is to rectify a miscarriage of justice which rose in Principal Magistrate’s Court at Mariakani Criminal Case No. E082 of 2020 due to misconception of the law relating to exhibits, irregularity of procedure, neglect of procedural precautions and safeguards, apparent error/mistake on the face of the record.

29. In admitting criminal revision applications, judicial officers have to do so with extreme caution in order to avoid instances where parties bring forth an appeal in disguise of a criminal revision. In **Joseph Nduvi Mbuvi v Republic [2019] eKLR** the Court made the following observation;

*“In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. As was stated by the High Court of Malaysia in Public Prosecutor vs. Muhari bin Mohd Jani and Another [1996] 4 LRC 728 at 734, 735:*

*“The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”.*

30. The trial Magistrate at page 8 of his ruling stated that the provision of these sections clearly envisage that at the end of the trial, in the event of a conviction, the accused persons shall be fined with alternatives of imprisonment. The trial Magistrate went further to state that the fines are by no means very punitive in nature and there is n indication in the Act that the conveying vessel shall or may be forfeited to the state in the event of conviction.

31. Section 120 of the Petroleum Act of 2019 provides as follows;

*“Where a person is convicted of an offence under this Act, in addition to any other penalty imposed, an order shall be made—*

*(a) for the forfeiture of any vehicle, aircraft, vessel or equipment used in the commission of the offence;*

*(b) for the forfeiture of petroleum recovered in the course of the commission of the offence;*

*(c) for the payment by that person to the national government of an amount equal to the proceeds of the sale of the petroleum so received; or*

*(d) for the payment by that person to the national government of the value at the wellhead, assessed by the court in respect of the quantity recovered or for the payment of such a part of that amount as the court, having regard to all the circumstances, deems fit.”*

32. In light of the above, I find that the trial Magistrate misapprehended the law by finding that there is no indication in the Act that the conveying vessel shall or may be forfeited to the state in the event of conviction. This amounts to an error apparent on the face of the law and therefore the application before this Court qualifies as an application for revision.

**Whether the Magistrate Court ought to have released Motor Vehicle registration number KCT 191 S to the 2<sup>nd</sup> Respondent.**

33. From the record it is clear that the application before the trial Court was served upon the prosecution and thereafter hearing proceeded on 18<sup>th</sup> December, 2020. At the hearing of the application the 2<sup>nd</sup> Respondent Counsel availed proof of the subject Motor Vehicle confirming that she is the registered owner of the suit Motor Vehicle. In the supporting affidavit to the application in the trial Court, the 2<sup>nd</sup> Respondent

herein averred that her intentions of purchasing the subject motor vehicle was to use it for purposes of transporting goods for desirous clients so as to earn a living and therefore urged the Court to release the Motor Vehicle to her.

34. The prosecution in response to the application submitted that in the event of a conviction, the prosecution shall be seeking to have the motor vehicle forfeited under the Criminal Procedure Code hence the prosecution will be prejudiced in the event the Motor Vehicle is released at this stage. The prosecution also submitted that in the event Court grants the prayers sought before the trial Magistrate, the same should be on the following conditions;

- 1) The Motor Vehicle be photographed by scenes of crimes officers.
- 2) The subject Motor Vehicle should not be sold/disposed off in any way while the case is ongoing.
- 3) The applicant to avail the Motor Vehicle on and when required to do so by Court.

35. From the record, it is clear that the prosecution did not file any affidavit from the Investigating Officer and/or Complainant in opposition to the 2<sup>nd</sup> Respondent's application before the trial Court for reasons well known to themselves.

36. The applicant has also brought the application before this Court under the provisions of Section 4, 9, 16, 19 & 20 of the Victims Protection Act. Section 19 and 20 of the Victims Protection Act provides as follows;

***“(19) Right to information***

***(1) A victim has the right to information under Article 35 of the Constitution, this Act or any other written law.***

***(2) The information referred to in subsection (1) shall be such information as is necessary for the realization by the victim of their rights under this Act.***

***(3) The right to obtain information under this Act shall not unreasonably delay or prejudice the investigation or prosecution or affect the safety or security of any person or in any way, interfere with the course of justice. No. 17 of 2014 Victim Protection [Rev. 2019] 14***

***(4) The Board shall within six months of the commencement of this Act, in consultation with the Director of Public Prosecution, develop a victims' rights charter which shall include —***

***(a) the structure and operation of the justice system; (b) the rights of victims in the justice system;***

***(c) the rights of the accused in the justice system;***

***(d) the role of lawyers and other officers of the court in the case;***

***(e) victim services;***

***(f) the status of the police investigations;***

***(g) the specific offences the accused is charged with as relates to the victim and the reasons therefor;***

***(h) the name or names of the accused;***

***(i) the dates and locations for hearing of the case;***

***(j) any interim or final decisions as relates to the case including decisions on bail or any final judgment;***

***(k) where the accused is in custody, information as to where he or she is detained;***

***(l) where the accused is due to be released from custody, the due dates of release and any conditions attached to the release pending hearing ;***

***(m) the means for the victim to report any threat by the accused before, during or after the finalization of the case;***

***(n) the Board on the Power of Mercy and the means to contact the Committee for purposes of giving the perspective of the victim in accordance with Article 133 (4) of the Constitution; and***

***(o) where an offender is convicted to serve a non-custodial sentence, including community service orders under the Community Service Orders Act, 1998 (No. 10 of 1998), or probation under the Probation of Offenders Act (Cap. 64), the area where the offender is likely to serve the term and whether the offender will be in the vicinity of the victim.***

**20. Right to submit information**

**(1) A victim has a right to submit any information for consideration to the —**

**(a) police or prosecution on a decision whether or not to lay a charge, or to appeal or withdrawal;**

**(b) court during plea bargaining, bail hearing and sentencing;**

**(c) Advisory Committee on the Power of Mercy established under the Power of Mercy Act, 2011 (No. 21 of 2011), on the release or pardon of a convict.**

**(2) Where a victim gives any information to a law enforcement officer, the officer shall inform the victim that —**

**(a) the information shall be ascertained for submission to the Court;**

**(b) the victim shall ensure that any information that the victim gives is true; and**

**(c) the information may be recorded and signed by the victim. [Rev. 2019] Victim Protection No. 17 of 2014 15**

**(3) The collection of any views from a victim under this section shall not prejudice or delay any proceedings relating to the offence complained of.”**

37. That in light of the above, it is clear that a victim’s views are expressed through the Investigating Officer and/or the prosecution. I have gone through the record and I can confirm that the prosecution was duly served with the 2<sup>nd</sup> Respondent’s application before the trial Magistrate and the prosecution was under a duty to inform the applicant of the existence or the pendency of that application.

38. The trial Magistrate in his ruling observed 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. The trial magistrate at page 5 of his ruling also cited the case of **David Muigai Mucheru v Kenya Forest Service & Another (2012)** in support of his jurisdiction to issue an order in relation to the suit Motor Vehicle.

39. The applicant herein has failed to demonstrate prejudice if any that it will suffer in the event the subject Motor Vehicle is released to the 2<sup>nd</sup> Respondent upon compliance of all the 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 3<sup>rd</sup> and 4<sup>th</sup> respondents have not yet been found guilty and/or convicted with the offences they are charged with before the trial Court thus they are still presumed innocent until proven guilty. In the event the 3<sup>rd</sup> and 4<sup>th</sup> respondents are found guilty, the 2<sup>nd</sup> respondent shall be still expected to show cause why the subject motor vehicle should not be forfeited.

40. In light of the above and reasons cited by the trial Magistrate at page 6 of the ruling, I find that there is no compelling and/or sufficient reasons to warrant this Court to interfere with the trial Court’s ruling of 21<sup>st</sup> December, 2020 and the conditions set by the trial Court and this Court for the release of the suit motor vehicle are enough to protect the interests of the applicant’s in this case. To that end, the application dated 4<sup>th</sup> January, 2021 is hereby dismissed with no order as to costs.

It is so ordered.

**Dated, signed and delivered online by MS TEAMS, this 26<sup>th</sup> day of February, 2021**

**HON. LADY JUSTICE A. ONG’INJO**

**JUDGE**