REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL REVISION NO. 177 OF 2019

EDWIN JOEL NYAMEINO.....APPLICANT

VERSUS

PETRONILLA AKUKU AKUMU.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

(From the Order made in Eldoret Chief Magistrate's Court's Criminal Case No. 142 of 2019 by Hon. R. Odenyo, SPM on 17 July 2019)

RULING ON REVISION

[1] The Notice of Motion dated **30 December 2019** was filed herein by the applicant, **Edwin Joel Nyameino**, pursuant to the provisions of **Sections 362 and 364** of the **Criminal Procedure Code, Chapter 75** of the Laws of Kenya, through the law firm of **M/s Walter Wanyonyi & Company Advocates.** He thereby prayed for orders that:

> **[a]** Spent
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> **[b]** The record of proceedings in **Eldoret Chief Magistrate's Miscellaneous Criminal Application No. 142 of 2019: Petronilla Okumu vs. The Director of Public Prosecutions and Edwin Nyameino** be called for and examined by this Court for the purpose of satisfying itself as to the correctness, legality and propriety of the orders issued on **16 December 2019**; and in particular the order releasing **Motor Vehicle Registration No. KXF 881**, Toyota Hilux Pickup;
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> **[c]** The said orders be lifted, and/or quashed and/or stayed pending the hearing and determination of the application.

[2] The application was premised on the grounds that the applicant is the sole registered owner of the subject motor vehicle; and that the 1st respondent secretly and without notice, filed separate proceedings for the release of the motor vehicle, other than **Eldoret Chief Magistrate's Criminal Case No. 1321 of 2018: Republic vs. Robert Sakwa Sigala**, in respect of which the said motor vehicle had been impounded. It was therefore the contention of the applicant that the motor vehicle had been wrongfully released to the 1st respondent; and that the 1st respondent is likely to tamper with it in the interim. The applicant also faulted the lower court for releasing the motor vehicle to the 1st respondent without any basis whatsoever; thereby denying the applicant his vested rights of ownership.

[3] In his Supporting Affidavit sworn on **30 December 2019**, the applicant averred that, in making a finding that the documents he produced in proof of ownership were forged without making any inquiry in that regard, the lower court exhibited open bias in favour of the 1st respondent. He further averred that the lower court did not have the power to release the subject motor vehicle as it did; as the release had the effect of condemning him unheard.

[4] In her response to the application, the 1st respondent relied on her Replying Affidavit, sworn on **12 February 2020**. She averred that the ruling of the lower court dated **16 December 2019** was made in accordance with the law and the facts presented before the court; and therefore that no error, either in fact or law, was made by the court to warrant revision. She further refuted the applicant's assertion that he was condemned unheard by the lower court. She pointed out that the applicant was admitted to the proceedings as an interested party; and that he participated fully in those proceedings by filing a replying affidavit as well as written submissions which the lower court considered before making its ruling. Accordingly, she asserted that the applicant had not pointed out any irregularities or illegalities in the lower court's proceedings to warrant a revision.

[5] The application was urged by way of written submissions, filed on **5 May 2020** by counsel for the applicant, **Mr. Wanyonyi**. His main argument was that, by the time the release order was made, hearing of **Eldoret Chief Magistrate's Criminal Case No. 1321 of 2018** had not

commenced; and therefore the release was done in disregard of the provisions of **Section 177** of the **Criminal Procedure Code**. He relied on **Republic vs. Everlyn Wamuyu Ngumo** [2016] eKLR and **Elijah Nyakebondo vs. Republic** [2017] eKLR to support his argument that the order for the release of the subject motor vehicle was made without jurisdiction.

[6] It was further the submission of **Mr. Wanyonyi** that the agreement produced before the lower court by the 1st respondent did not meet the threshold of a contract between the parties as no consideration was ever paid. He faulted the lower court for ignoring the documents presented before him by the applicant herein; and therefore contended that the court exhibited bias and open favouritism for the 1st respondent. Accordingly, counsel urged the Court to find merit in the application dated **30 December 2019** and to allow the same with costs.

[7] On behalf of the 1st respondent, written submissions were filed herein on **5 May 2020** by **M/s Melly & Company Advocates**. In those submissions, **Ms. Cheruiyot** reiterated the 1st respondent's assertion that the applicant was admitted to the lower court proceedings as an interested party; and that he had the opportunity to file and did file his replying affidavit and written submissions to the application that yielded the impugned orders. It was therefore her submission that the applicant cannot now claim that he was condemned unheard.

[8] **Ms. Cheruiyot** was also of the view that the applicant has failed to show that the applicant is entitled to the orders sought. She relied on **Joseph Waweru vs. Republic** [2014] eKLR and **Anne Jerop vs. Director of Public Prosecutions** [2014] eKLR for the holding that the Court must be satisfied that there exist sufficient circumstances warranting the setting aside of the decision of the lower court; either that it acted upon a wrong principle, or overlooked material factors. In her view, the applicant ought to have filed an appeal instead, so as to ventilate his grievance with the decision of the lower court on its merits.

[9] Counsel cited the case of **Superfoam Ltd & Another vs. Gladys Nchororo Mbero** [2014] eKLR and **Samwel Mukunya Kamunge vs. John Mwangi Kamuru,** Civil Application No. 34 of 2002, to underscore her argument that the 1st respondent had presented the best evidence in proof of her claim to ownership of the subject motor vehicle for purposes of **Section 8** of the **Traffic Act, Chapter 403** of the **Laws of Kenya**. She underscored the assertion by the 1st respondent that the subject motor vehicle was stolen from her custody; and that she is the complainant in **Eldoret Criminal Case No. 1321 of 2018**. Consequently, counsel urged the Court to find that the lower court was within its jurisdiction in granting the orders it made in the impugned ruling dated **16 December 2019**. She prayed, then, that the instant application be dismissed with costs.

[10] Although granted time for compliance, the 2nd respondent neither responded to the application nor put in written submissions herein.

[11] Upon receipt of the application, the Court called for the lower court record, pursuant to its supervisory mandate under **Article 165(6) and (7)** of **the Constitution** and **Section 362** of the **Criminal Procedure Code. Article 165(6)** and **(7)** of the **Constitution** is explicit that:

> **(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 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.**

[12] The Court of Appeal had occasion to consider the scope of this supervisory role, albeit within the context of a dispute in connection with the impeachment of a governor, in **Martin Nyaga Wambora & 3 Others vs. Speaker of the Senate & 6 Others** [2014] eKLR. Here is what it had to say which I find pertinent:

> **"Our reading of *Article 165 (6)* of the *Constitution* reveals that the role of the High Court for purposes of removal of a Governor from office is *inter alia* supervisory in nature to ensure that the procedure and threshold provided for in the *Constitution* and the *County Governments Act* are followed. If the process for removal of a Governor is unconstitutional, wrong, un-procedural or illegal, it cannot be said that the court has no jurisdiction to address the grievance arising therefrom. (See *Mumo Matemu – vs- Trusted Society of Human Rights Alliance & 5 Others (supra)).* In its supervisory role, the jurisdiction of the High Court is dependent on the process and constitutionality of the action taken. In the instant case, in its supervisory role, the High Court is to examine whether any procedural law was violated by the County Assembly or Senate in arriving at their decision."**

[13] And, for purposes of revision, **Section 362** of the **Criminal Procedure Code** provides that:

> **"The High court may call for and examine the records 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.**

[14] Likewise, Section 364(1)(b) of the **Criminal Procedure Code,** stipulates that:

> **"In the case of a proceeding in 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 ... in the case of any other order other than an order of acquittal alter or reverse the order."**

[15] In the light of the foregoing provisions of the law and applicable precedents, I have accordingly carefully perused and considered the record of the lower court in **Eldoret Chief Magistrate's Miscellaneous Criminal Application No. 142 of 2019.** The matter was filed by the 1st respondent herein against the Director of Public Prosecutions for the release of **Motor Vehicle Registration No. KXF 881**, Toyota Pick

Up. The record further shows that the applicant applied for joinder and was duly enjoined to the lower court matter on **17 July 2019**. He thereafter filed his replying affidavit on **27 August 2019** and fully participated in the proceedings of the lower court, including the filing of written submissions therein.

[16] Thus, in his ruling dated **16 December 2019,** the learned trial magistrate made his findings and observations as follows:

> **"…It is instructive that the applicant had not attained a log book to her application to prior ownership. In the application by the interested party a copy of the Log book was attached showing that the interested party was the registered owner of the motor vehicle…I am not convinced that the copy of records [attached] is genuine. In all the pleadings as well as the copy of the log book, the motor vehicle KXF 881 is acknowledged to be a pick-up. At what stage did the vehicle change its make from pick up to saloon.**
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> **In short I find the documents of the interested party to be suspicious and I will refrain from relying on them. If the interested party has a claim he considers genuine, let him file a substantive suit against the applicant herein and produce original documents which shall be subjected to scrutiny during trial…"**

[17] And with that the lower court dismissed the interested party's application dated **16 July 2019** and issued an order that the subject motor vehicle be released to the 1st respondent with instructions that the same be availed to court whenever required. In the premises, the key issue for consideration is the question whether the proceedings of the lower court and the ruling dated **16 December 2019** can be faulted in terms of **correctness, legality or propriety.**

[18] It is manifest from the foregoing that the learned magistrate reached his decision after giving due consideration to the respective positions taken by the parties before him. It is therefore incorrect for the applicant herein to say that he was condemned unheard. To the contrary, it is plain that he was given leave to join himself to those proceedings as an interested party; and was thereby given an opportunity to articulate his case before the ruling of **16 December 2019** was delivered. It is further incorrect for the applicant to allege, as he did in paragraph 7 of his Supporting Affidavit that:

> **"…the ruling was not delivered as scheduled and the court ultimately delivered the ruling on 16/12/2019 without giving any notice whatsoever to myself…"**

[19] I say so because the record shows that on **2 December 2019** when the matter was last mentioned before the lower court to confirm the filing of written submissions, the same was fixed for ruling on **16 December 2019** in the presence of **Mr. Langat** and the Prosecuting Counsel, **Mr. Gacuo**, whereupon the State was given 7 days to put in written submissions. The record also confirms that the ruling was delivered on **16 December 2019** as scheduled. There is therefore nothing irregular or illegal about the manner in which the ruling was delivered.

[20] Copious submissions were made herein by counsel for the applicant attacking the soundness or merits of the decision arrived at by the learned trial magistrate. For instance, the applicant endeavoured to show that, between the applicant and the 1st respondent, the applicant adduced better evidence in proof of his claim to ownership of the subject motor vehicle. My considered view however is that, when it comes to perceived errors in the appreciation of the facts of a particular case and the application of the law to those facts, the trial magistrate's decision can only be competently challenged on appeal; for he committed no illegality in making a finding in favour of the 1st respondent.

[21] In the same vein, I find the applicant's allegations of bias, just because a decision went against him, to be entirely misguided. In any case, this would not be the right forum to raise those arguments. Perhaps the only valid ground in support of the application for revision is the applicant's argument that the release order was made in a miscellaneous application as opposed to the substantive criminal case in respect of which the motor vehicle was impounded. Thus, counsel relied on **Section 177** of the **Criminal Procedure Code** in support of his submission that the release was irregular. That provision states that:

> **"Where, upon the apprehension of a person charged with an offence, any property is taken from him, the court before which he is charged may order-**
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> > **(a) 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; or**
> >
> > **(b) That the property or a part thereof be applied to the payment of any fine or any costs or compensation directed to be paid by the person charged."**

[22] This, in my view, is jurisdiction to be exercised by the trial magistrate in the criminal matter; in this case in **Eldoret Chief Magistrate's Criminal Case No.1321 of 2018.** And, the mere fact that the lower court made an order for the release of the subject motor vehicle to the 1st respondent is no bar to the exercise of the power conferred by **Section 177** of the **Criminal Procedure Code** by the trial court in the criminal matter. I say so because the learned magistrate did not purport to make a final determination as to the ownership of the subject motor vehicle. Indeed, the impugned order included a command to the 1st respondent to avail the motor vehicle for purposes of the criminal trial whenever required; and therefore, the said motor vehicle is still within the jurisdiction of the trial court for purposes of **Section 177** of the **Criminal Procedure Code.**

[23] It is not lost on the Court that the 1st respondent is the complainant in the criminal matter; and that it was from her that the subject motor vehicle is alleged to have been stolen in **2017**. In the circumstances, any rival claims to ownership could only be fairly entertained in a civil suit, and the learned magistrate was within his remit to refer the parties to the civil jurisdiction of the court as he did. Hence, I find

nothing in the record of the lower court to show an illegality, irregularity or impropriety, not even from the standpoint of **Section 177** of the **Criminal Procedure Code**, to warrant revision.

[24] In arriving at this conclusion, I have given due consideration to the two persuasive decisions by **Hon. Bwonwonga J**. that counsel for the applicant drew my attention to, but find them inapplicable to the circumstances hereof. For instance, in **Republic vs. Everlyne Wamuyu Ngumo** (supra), the impugned order was made in the course of the criminal trial; and the motor vehicle the subject of the order was released to the accused person, yet the motor vehicle was intended to be produced by the prosecution as an exhibit. Thus, the Court held that:

> **"…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…"**

[25] In **Elijah Nyakebondo Onsongo vs. Republic** (supra), the subject motor vehicle was impounded pursuant to the provisions of the **Forest Act, No. 7 of 2005,** which entail forfeiture; and an order was made in a miscellaneous file for its release to the owner who was one of the accused persons. Hence, **Hon. Bwonwonga, J.** observed that:

> **"In the instant matter the case had not gone for trial, because the driver of the subject motor vehicle, who is the potential accused had not been traced. Furthermore, it is also clear that the subject motor vehicle, which was found to be transporting about 200 cedar posts from Mau forest on 2/2/2017 did not have the permit from Kenya Forest Service. This is clear from the letter of Kenya Forest Service. Furthermore, the release of the subject motor vehicle will prejudice the investigation and subsequent prosecution of the driver. Under section 55(1)(c) of the Forest Act No. 7 of 2005 any vessel, vehicles, tools or implements used in the commission of the offence are liable to be forfeited to the Kenya Forest Service. I find that in view of these provisions the order of the magistrate's court had the effect of prejudicing the investigations and the intended subsequent prosecution of the driver…"**

[26] In this matter, it was not the position of the state that the release of the motor vehicle to the 1st respondent would, in any way, prejudice or undermine the prosecution of the criminal case. Moreover, there is no indication, from the material placed before this court, that the criminal proceedings are likely to lead to forfeiture of the subject motor vehicle. Thus, for purposes of the criminal case, no person is better suited to keep the motor vehicle in safe custody pending trial than the complainant, the 1st respondent.

[27] In the result, therefore, I find the application for revision is completely devoid of merit. The same is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 25TH DAY OF FEBRUARY 2021

OLGA SEWE

JUDGE