



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: D. K. Kemei J)

REVISION NO. E008 OF 2021

REPUBLIC.....APPLICANT

VERSUS

RESIDENT MAGISTRATE, MACHAKOS LAW COURTS.....1ST RESPONDENT

BRIAN MUTUKU BROWN.....2ND RESPONDENT

GABRIEL KIMEU KYENGO.....3RD RESPONDENT

RICHARD KILUNGU MUTUA.....4TH RESPONDENT

PETER MUASYA.....5TH RESPONDENT

RULING

1. The 2nd, 3rd, 4th and 5th Respondents have been charged with an offence of trespass and logging in a Wildlife Conservation area without a permit contrary to section 102(1)(a) and (c) as read with section 105 of the Wildlife Conservation and Management Act, 2013. In the course of the arrest, motor vehicle registration number KCH 757B Toyota Van/Pick-Up was impounded by the Kenya Wildlife Officers and placed in the custody of Kyumbi police station on the basis that it was being used to ferry the indigenous tree species from the restricted area.
2. The 2nd to 5th Respondents were charged before *Machakos law courts* vide *Criminal case number E405 of 2021*. The 2nd Respondent is said to have orally asked in court for the release of the said motor vehicle which was objected to by the prosecution. The 1st Respondent vide his order issued on 1st February 2021 ordered for the release of motor vehicle registration number KCH 757B Toyota Van/Pick-Up to the 2nd Respondent before close of business after the investigating officer has taken photographs of the same.
3. The Kenya Wildlife Service, Machakos Station vide the Notice of Motion dated 2nd February 2021 supported by the affidavit of KWS/5675 W1 Polycarp Okuku is seeking the following orders:-
 - (i) *Spent.*
 - (ii) *The Honourable court be pleased to issue a revision order as earlier made.*
 - (iii) *The Honourable court be pleased to make an order that the motor vehicle registration number KCH 757B Make-Toyota Hilux be detained at Kyumbi police station as an exhibit and be produced before court when needed until finalization of the matter.*
 - (iv) *No cost as to this order.*
4. The application is based on grounds that investigations reveal that the motor vehicle was registered under the name of one Kennedy Mutinda Brown and not transferred to any of the accused persons hence the actual owner has not made any application for release order from the court. It was averred that the investigating officer may detain any vessel or vehicle used in the commission of an offence under Act pursuant to section 110(d) of the Wildlife Conservation and Management Act, 2013.
5. The prosecution has urged the court to order that the motor vehicle be detained at Kyumbi police station until the finalization of the matter. The prosecution is worried that the accused person may dispose of, damage or commit a similar crime with the motor vehicle.

6. The application is premised on sections 362 and 364 of the Criminal Procedure Code:-

Section 362 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.”

Section 364 provides that;

(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.

7. The prosecution has placed reliance on section 105 of the Wildlife Conservation and Management Act, 2013 No. 47 of 2013 where it is provided that:-

“The court before which a person is charged for an offence under this Act or any regulations made there-under may, in addition to any other order –

(a) upon the conviction of the accused; or

(b) if it is satisfied that an offence was committed notwithstanding that no person has been convicted of an offence, order that the wildlife trophy, motor vehicle, equipment and appliance, livestock or other thing by means whereof the offence concerned was committed or which was used in the commission of the offence be forfeited to the Wildlife Conservation and Management Service and be disposed of as the court may direct...”

8. It is submitted by the prosecution that the trial magistrate erred in releasing the motor vehicle which is an important exhibit that needs to be preserved until the end of the criminal trial. Further, the 2nd Respondent is not the actual owner and who has no rights to claim the motor vehicle. It is submitted that the trial magistrate failed to put any restrictions to National Transport and Safety Authority to caution any dealings with the said motor vehicle. According to the prosecution, the release was premature hence the trial magistrate’s order should be overturned and the motor vehicle be placed in the custody of Kenya Wildlife Services pending trial.

9. In opposition to the application, the 2nd Respondent swore a replying affidavit on 12th February 2021 with the authority of the 3rd to 5th Respondents. He deponed that the application is incompetent, frivolous and a waste of court’s time. According to him, the determination by the trial court was based on evidence on record and the gravity of the offence. It is further averred that section 110(d) of the Wildlife Conservation and Management Act, 2013 does not provide for the procedure by which forfeiture is effected. He deponed that there is no requirement under section 110(d) that the court before which a person is charged must seize the property or vessel as an exhibit before the court can give orders to release the property of the vessel. It was further averred that the Act does not provide that for forfeiture to happen, the motor vehicle must be in the custody of the applicant.

10. It is averred by 2nd Respondent that the motor vehicle is for commercial purpose hence it will have an impact on the 2nd Respondent’s livelihood as he was the one driving the motor vehicle at the time of arrest. Based on the advice of his counsel, the 2nd Respondent averred that the application breaches section 389A of the Criminal Procedure Code. It was also averred that the applicant has not served the motor vehicle owner with a notice hence the owner will lose the motor vehicle without the opportunity to be heard. The 2nd Respondent opposed the revision of the trial magistrate order.

11. In the 2nd to 5th Respondents submissions are dated 21/7/2021. The Respondents counsel submitted that the application is tantamount to restraining the discretionary power of the trial magistrate under section 177 of the Criminal Procedure Code to release the motor vehicle to the 2nd Respondent. Reliance is placed on the case of ***ODPP & 2 Others vs Resident Magistrate, Machakos Law courts & 2 Others [2021] eKLR.***

12. As regards section 110 of the Wildlife Conservation and Management Act, 2013 No. 47 of 2013, counsel submitted that the provision is discretionary. It was submitted that the applicant has not demonstrated any irregularity in the order it is seeking to revise. Counsel submitted that the Respondents are willing to preserve and produce the motor vehicle when it is needed in court. It will be prejudicial to the 2nd Respondent if the motor vehicle is detained since it is his source of income. According to counsel, restrictions in regard to any dealings with the motor vehicle is not a ground for revision hence an afterthought by the applicant. Counsel urged the court to dismiss the application and not revise the trial magistrate’s order.

Determination

13. I have considered the application, rival affidavits and submissions filed. The only issue for determination is *whether an order for revision is merited.*

14. Section 362 is clear on the scope of revision in criminal trials as follows:-

“..... purposes 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.”

15. Revision is discretionary. The Court in the case of **BGM HCCR Revision No 27 of 2013 Martin Maruti Kituyi vs Republic** rendered itself on the revision jurisdiction of the High Court in the following manner:-

“[11] Under Article 50(2) (q) of the Constitution, Appeal and Revision are part of the right to fair trial in a criminal proceeding. Both are constitutional processes for enforcement of legal relief. Except, the court must consider an Appeal as a matter of right whilst Revision under Article 165 (6) and (7) of the Constitution is a matter for the discretion of the court. In the new constitutional structure, Revision is a constitutional relief only that sections 362 to 367 of the CPC are merely the statutory expression of, and the procedural prescriptions attending the remedy of Revision. Therefore, the very nature of Revision as a discretionary remedy explains the policy underpinnings of section 364 (5) of the CPC; Revision primarily serves to put right instances where a finding, sentence, order or proceedings of a lower court are tainted by incorrectness, impropriety, illegality or irregularity. Those words are key pillars that define the Revision jurisdiction. Broadly put, whenever the integrity of any proceeding is put to question, the Revision jurisdiction of the High Court comes into play and may disturb the decision of the lower court purely in the best interest of justice.”

16. 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 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...”

17. The 1st Respondent's order sought to be revised is in the following terms:-

“.....IT IS HEREBY ORDERED THAT:-

- 1. THAT the motor vehicle registration number KCH 757B be released to the 1st Accused.**
- 2. THAT the investigating officer take photographs of the same thereafter the same to be released to the 1st Accused owner before the close of business today...”**

18. I have noted the decision of **Republic vs Everlyne Wamuyu Ngumo [2016] eKLR** relied on by the prosecution that the trial court did not have jurisdiction to order for the release of the motor vehicle to the accused person as the prosecution intended to use it in proving their case against the accused person. Similarly, in **Elijah Nyakebondo vs Republic [2017] eKLR** the court held that until property or properties are produced before the subordinate court as exhibits, the court will not have the jurisdiction to order release of the same. In the converse **A. Ochieng J in David Muigai Macheru vs Kenya Forest Service & Another [2012] eKLR** held that there is no requirement in that section (177 of the CPC) that the court before which the person is charged must have received the property as an exhibit before the court can give orders in relation thereto.

19. It was my considered view in the case of **ODPP & 2 Others vs Resident Magistrate, Machakos Law courts & 2 Others [2021] eKLR** that the trial court should be allowed to exercise discretion to release exhibits or items brought before it in the determination of cases and the discretion to do so is found under section 177 of the Criminal Procedure Code. The court is not to be hamstrung in its role to do justice to the parties. In the present case, the prosecution is alluding to the subject vehicle being registered in names of a third party yet it has not availed any documents such as copies of search of motor vehicle for perusal. The 2nd respondent in whose favour the order has been made is bound by the said order to ensure that the said vehicle is always availed to the trial court whenever the same is needed and in default then he stands to be punished appropriately. No evidence has been shown by the prosecution that the 2nd respondent has failed to comply with the trial court's order of release of the vehicle. Further, if the state intends to forfeit the vehicle in the event of a conviction, then it is only logical that the said vehicle ought not to be kept at the police yard to go to waste and thereafter lead to economic loss during the forfeiture and disposal. It makes economic sense to have it released to the 2nd respondent who will be availing it to court as when needed.

20. In my view, I see no prejudice that the prosecution will suffer in its case against the Respondents if the motor vehicle is released to one of the accused persons as long as the conditions imposed by the trial court are adhered to. The prosecution is in possession of the indigenous tree species which were seized as exhibits and which are liable to be forfeited by the state in the event of conviction of the suspects. The investigating officer was ordered to take photographs of the motor vehicle and that Kenya Wildlife Service representative has knowledge that the motor vehicle is registered in the name of one Kennedy Mutinda Brown by National Transport Authority. If that is the position, then the said third party ought to be enjoined in the proceedings as his rights might be prejudiced if orders are made in his absence. The 2nd Respondent avers that the motor vehicle is his source of livelihood and is bound by the 1st Respondent's order. Ordinarily, if the order is not complied with by the Respondents then section 105(1) (b) of the Wildlife Conservation and Management Act, 2013 can be invoked by the court and that the applicant is still at liberty to approach the trial court and seek to obtain further orders as appropriate even as the trial continues. Up to that stage, it would appear that the applicant should comply with the 1st Respondent's order of 29/1/2021 by releasing motor vehicle registration number KCH 757B to the 2nd Respondent but for the fact that the said 2nd respondent has not presented any documents of ownership of the said vehicle. The 2nd respondent must show that he is indeed the registered or beneficial owner of the vehicle so as to rule out the possibility that he is holding brief for someone else which might complicate matters for the prosecution after conclusion of the

case. The prosecution's fears appear legitimate as there might be a possibility that the vehicle could be transferred or that the 2nd respondent might part with possession of the same. The present circumstances are different from what obtained in the case of **DPP & 2 Others Vs Chief Magistrate Machakos law courts & 2 others (Supra)** in that the 2nd respondent herein has not presented any document of ownership of the vehicle whereas in the above case the applicant who was then a boda boda rider had documents though he was yet to effect transfer. The 2nd respondent herein merely claimed that he uses the vehicle for his livelihood and it is on that basis that the learned trial magistrate made the impugned order. It was proper for the trial court to first establish whether the 2nd respondent was indeed the owner of the vehicle in issue before making the orders. Even though the trial court is seized with inherent power to make orders regarding exhibits, it should ensure that the safety and security of the said exhibits is secured so as not to prejudice the trial. It is noted that the trial court merely ordered that photographs be taken and vehicle released to the 2nd respondent without establishing whether or not he was indeed the owner thereof. It is at this juncture that I must find for the prosecution that the release of the vehicle without evidence of ownership documents will be prejudicial to them as the trial is yet to be commenced and concluded. Suffice here to add that the suit motor vehicle might stand to be forfeited to the state in the event of a conviction. The prosecution has maintained that the vehicle might be registered in names of a third party who has not been enjoined in these proceedings and hence the need to preserve it pending further orders. The order that photographs be taken is in my view not sufficient as there was need to put in more conditions upon the 2nd respondent to comply with before he obtains possession of the vehicle. This then warrants an order of revision of the trial court's order.

21. In the upshot, I find the Notice of Motion dated 2nd February 2021 merited. The same is allowed and that the trial court's orders made on the 29/1/2021 are hereby set aside and substituted with the following orders:

a) Motor vehicle registration number KCH 757B make Toyota Van/pick-up shall be released to the 2nd respondent herein upon presentation of proof of ownership of the same.

b) The 2nd respondent is ordered to deposit the logbook of the said vehicle with the trial court which shall thereafter organize to place the requisite restrictions to the National Transport and Safety Authority so as to caution any dealings with the subject motor vehicle pending conclusion of the trial.

c) The 2nd Respondent is ordered not to part with possession of the said vehicle or transfer it to other persons during the pendency of the trial and further ordered to avail the same to the trial court as and when required.

d) Each party to bear their own costs of the application.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 30TH DAY OF JULY, 2021.

D. K. Kemei

Judge