



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CRIMINAL APPLICATION NO. 19 OF 2020**

**1. JACOB MUTUKU MUSAU**

**2. SYLVESTER MBULI MBUVI**

**3. AMOS MUTUKU MUSYOKA**

**4. PATRICK KARANJA NJAU.....APPLICANTS**

**VERSUS**

**1. THE MOMBASA COUNTY CRIMINAL INVESTIGATING OFFICER (CCIO)**

**2. THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENTS**

**R U L I N G**

1. By an application dated 6<sup>th</sup> of April 2021 the applicant's herein sought under Articles 165(3), 2, 19, 20(1), (2), (3) & (4), 21, 22, 27 & 40 of the Constitution of Kenya 2010 and Sections 121 of the Criminal Procedure Code that this court issues an order directed at the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein and/or their subordinate officers and/or any other person acting under or through them to immediately and forthwith recover and release the items listed in the body of the application to respective applicants as per inventories prepared upon recovery of the items in their house.

2. The application is supported by the grounds on the face of the application and affidavit of Jacob Mutuku Musau sworn on 6<sup>th</sup> April 2021 and further affidavit sworn on 10<sup>th</sup> June 2021. The application was opposed by the 1<sup>st</sup> Respondents grounds of opposition filed on 26<sup>th</sup> January 2021 and the 2<sup>nd</sup> Respondents grounds of opposition dated 26<sup>th</sup> January 2021 and 2<sup>nd</sup> Respondents Replying Affidavit sworn by Theresa Mwangeka prosecution Counsel on 30<sup>th</sup> October 2020.

3. The application was canvassed by way of written submissions. The 2<sup>nd</sup> Respondents submissions was that the fact that inventories were produced is in the way proof of ownership of the said exhibits. It was submitted that inventory only goes to prove possessions and not legal ownership of items recovered. The 2<sup>nd</sup> Respondent relied on the holding in **Republic vs Mohammed Kakundi Kibeni [2019] eKLR** that where one seeks release of an exhibit ownership must be proved.

4. The 2<sup>nd</sup> Respondent also submitted while relying in the case of **Republic vs Everlyine Wamuyu Ngumo [2016] eKLR** that this court has jurisdiction to order release of exhibits that were never produced at trial and as in the holding in Lillian Vessel case where the court doesn't have jurisdiction, it showed down its tool and dismiss the application for lack of jurisdiction.

5. The 2<sup>nd</sup> Respondent argued that in High Court Criminal Appeal No. 193 of 2017 the court entered judgment against the applicants co-accused by dismissing the appeal and found that the trial court had made an order for release of exhibits produced by PW 1 i.e 514000 Euros & PW 10 – 25170 Swiss Francs to G4s Company. It was argued that the applicants ought to have appealed against the decision to have the monies released to G4S Company. It was suggested that G4S ought to have been co-party to the application and they were left out. It was contended that remedies sought from the 2<sup>nd</sup> Respondent are unavailable as they are outside the constitutional mandate of the 2<sup>nd</sup> Respondent under Article 157 of the Constitution of Kenya 2010.

6. The 1<sup>st</sup> Respondent in submissions asserted that the applicants through acquitted from the charges in Mombasa Chief Magistrates Court

CR. Case No. 857 of 2010 are seeking to retain property that was seized and proven to be part of proceeds of crime and which the trial court stated that it was *functus officio* and that since the exhibits were not produced in court it could not issue a release order.

7. That in High Court CR. Appeal No. 193 of 2017 the court pronounced itself to the effect that the court had already made a release order of the exhibits notably Euros 541000 Swiss Francs 25170 to G4's Company. To that end the 1<sup>st</sup> Respondent argued that the application was frivolous, vexatious and an abuse of the courts process.

8. It was argued that the applicants were trying to circumvent the decision of the court in releasing the said property to the victim of the robbery G4s Company.

9. The 1<sup>st</sup> Respondent further argued that the applicants ought to have appealed the decision of the High Court in releasing the said exhibits to G4s Company as the orders of the High Court cannot be reviewed by a court of concurrent jurisdiction while relying in the holding in **Owners of Motor Vessel "Lillian S" vs Caltex Oil (K) Ltd [1989] eKLR**, the 1<sup>st</sup> Respondent argued that jurisdiction is the 1<sup>st</sup> Step of determination which may end a suit on action preliminary.

10. \*The 1<sup>st</sup> Respondent also submitted further that the relief sought by applicants has been over taken by events and relied in the case of **Samson Kaniu vs Republic [2018] eKLR** where it was held that only substantive proceedings specifically on the items seized by police can the court exercise jurisdiction and not as a revision application.

11. The 1<sup>st</sup> Respondent also urged the court not to issue orders that are in vain as 1<sup>st</sup> Respondent is not an agent of G4S. It was claimed that 1<sup>st</sup> Respondent released the properties to G4S Company pursuant to court directions. That making an order for release could amount to condemning GES unheard.

12. The applicants filed their submissions dated 30<sup>th</sup> June 2021 and argued that the court had unlimited jurisdiction conferred on it by Article 165(3)(a) of the constitution of Kenya 2010 and Section 177 Criminal Procedure Code to handle the instant application. They relied in the holding in **Peter Karuiki Mumbau & 11 Others vs AG & Another [2018] eKLR**.

13. The holdings in **Francisca Akinyi vs Republic, David Mungai Mucheru vs Kenya Forest Services & Another** were relied on to satisfy the applicants position that this court has jurisdiction to handle the current application.

14. The applicants argued that the 1<sup>st</sup> Respondents claim that property was seized and proven to be part of proceeds of crime is devoid of merit and has been raised to mislead the court since the applicants were not charged under the proceeds of crime and Anti-money Laundering Act and there was no finding that the exhibits were proceeds of crime in the trial Magistrates judgement.

15. The Applicants also argued that the Assets Recovery Agency had neither instituted recovery proceedings and neither was it pursued to prove that the exhibits were proceeds of crime. The applicants argued that the claim that properties seized from them where proceeds of crime was an afterthought and therefore lacks merit.

16. The applicants also submitted that they are strangers to appeal filed by their co-accused who were convicted and their application is not *res-judicata*. The applicants submitted that the items they are asking to be released were not produced and 1<sup>st</sup> Respondent admitted as much. That they said exhibits were never intended to be used as evidence to and in proving prosecution case.

17. It was argued that the 1<sup>st</sup> Respondent didn't give reasons as to why they thought application had been overtaken by events and that is an indication of their attitude to the Applicants constitutional rights under Article 40. It was argued that the Applicants stand to suffer prejudice if orders sought are not granted as they were acquitted and the exhibits in question were never found to be proceeds of crime and were never produced in court.

18. Having considered the application herein together with supporting affidavit and further affidavit as well as grounds of opposition and respective submissions by the parties and having considered the proceedings and Judgment of the trial Magistrate in Mombasa CMC CR. Case No. 857 of 2020 and Mombasa High Court CR. Appeal No. 193 of 2017 the issues for determination are whether the applicants have satisfied the court for the granting of orders sought herein.

19. The determination of the criminal charges in respect of the applicants herein appear at pages 11, 12 & 13 of the judgment of the trial court. For Jacob Mutuku Musau the trial Magistrate at page 11 paragraph 3 said that there was no evidence linking him and Mwende to the conspiracy and he and Eunice Mwende were acquitted in count 1. At page 12, 1<sup>st</sup> Applicant, 2<sup>nd</sup> Applicant, 3<sup>rd</sup> Applicant and one Mwende were also acquitted for the offence in Count III for reasons there was no evidence which was led to show that they jointly stole the money as alleged or at all as the arresting officer and investigating officer didn't testify to lay a basis for their prosecution as they were not part of the crew that was moving the money.

20. The 2<sup>nd</sup> & 3<sup>rd</sup> applicants were also acquitted in the alternative counts of handling stolen property by dishonest receipt. The 4<sup>th</sup> applicant together with one Kabanda Njau were also acquitted in count 5 where they were charged with offence of destroying evidence and receiving and retaining Kshs.686,000/= knowing it to be stolen or otherwise unlawfully obtained.

21. I have read both Judgments of the Lower Court and the High Court and I found no order releasing neither the exhibits nor the items recovered from the applicants and not produced in court to be released to G4s Company.

22. This court finds that the submissions by the Respondents that this court does not have jurisdiction to handle this matter is erroneous. The holdings in **Samson K. Kanui vs Republic** is also distinguishable because in that case applicant sought for revision of an order

releasing exhibits that had not been produced and the court held in the circumstances the court may not have jurisdiction over them in a revision application. It was held that only in substantive proceedings specifically on items seized by the police can the court exercise jurisdiction thereto.

23. The application herein was substantive. Parties concerned were given an audience and they have made presentations which in the mind of this court goes to the core of the matter and which is capable of adjudication by the court.

24. I do agree with the applicants counsel that the constitution confers original and unlimited jurisdiction to the High Court which cannot be curtailed in dispensing justices of the day. There are exhibits which were produced and my understanding is that the applicants are not seeking release of those ones but those that were recovered and recorded in the inventories that are annexed to the supporting affidavit and which the investigating officer didn't produce in court.

25. The affidavit of Paul Chebet No. 58062 in response to an application for release of the items in the current application at paragraph 4 states that the goods and money which the applicants seeks to be released were not produced upon deliberations with the legal team and that the Kenya Shillings, US Dollars, Euros and Sterling pounds were kept in safe custody as well as the sofa sets, motor vehicles and fridges were also kept on very safe custody at the Regional DCI Coast Police Headquarters.

26. Having said at paragraph 3 that the goods mentioned were taken from the suspects it is contradictory to say at paragraph 5 that the same were not produced because no evidence was given connecting the applicants to the goods and money. The Respondents have not taken out any proceedings to establish that the exhibits that were not produced did not belong to the Applicants.

27. This court therefore finds that the applicants are entitled to return of the items that were recovered from them and which were not produced in court during their trial in CR. Case No. 857 of 2010. The application dated 6<sup>th</sup> of April 2021 is therefore allowed to the extent alluded to above.

28. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED THROUGH MS TEAMS, THIS 23RD DAY OF SEPTEMBER 2021**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**IN THE PRESENCE OF:-**

**OGWEL – COURT ASSISTANT**

**MS. ROTICH ADVOCATE HOLD BRIEF FOR JERUTO ADVOCATE FOR APPLICANTS FOR RESPONDENT**

**MS. RUKIYA ADVOCATE FOR AG – NO APPEARANCE**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**COURT**

**RULING DELIVERED, DATED AND SIGNED IN COURT. NOTICE OF RULING TO BE SERVED ON THE RESPONDENTS.**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**