REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL REVISION NO. E020 OF 2021 (MERU)

ADAN GIMBE DAWE...1ST APPLICANT

ROBA GUYO HUKHA...2ND APPLICANT

VERSUS

ODPP MARSABIT...1ST RESPONDENT

NATHAN OBONYO

OCS MARSABIT POLICE STATION..........................2ND RESPONDENT

ATTORNEY GENERAL..3RD RESPONDENT

AND

KENYA REVENUE AUTHORITY..........................INTERESTED PARTY

(Being an application for revision of the orders of Hon. C. Ombija, Resident Magistrate, in Marsabit P.M.C. Misc. Criminal Application No. E024 of 2021)

RULING

1.The Interested Party has filed an application dated 26th May 2021 seeking for orders that –

(1) Spent

(2) **That this Honourable court be pleased to exercise its supervisory power of revision and revise, vary and/or set aside the orders issued on 25th May, 2021, BY Hon. Collins A. Ombija, Resident Magistrate Court in Marsabit Misc. Criminal case No.E024 of 2021, in Adan Gibe Dawe & Anor Vs ODPP Marsabit & 2 others releasing motor vehicle registration number KDA 200A loaded with 434 bags of sorghum, suspending any criminal proceedings against the applicants within the Jurisdiction, granting anticipatory bail to the applicants and further committed the interested party officer Raphael Mwaura to civil up to 18th 2021.**

(3) **That the honourable court do call and examine the record in the criminal proceedings before the subordinate in Marsabit Misc. Criminal case number E024 of 2021, in Adan Gibe Dawe & Anor Vs ODPP Marsabit & 2 others that is before Hon. Collins A. Ombija fore purposes of satisfying and pronouncing itself as to the itself as to the correctness, legality or propriety of the findings and orders issued on 25th May, 2021.**

2. The application was based on grounds on the face of the application and supported by the affidavit of one **Joel Ndege**, an officer of the Interested Party based at the Customs & Border Control Department, Moyale, wherein he deposed that their office at Moyale was called by Marsabit police on the 8th May 2021 and informed that they had intercepted a motor vehicle registration no. KDA 200A carrying 434 bags of sorghum suspected to be uncustomed goods from a neighbouring country. That the police requested them to avail an officer to inspect the goods. That on the following day an officer of the Interested party went to Marsabit police station to attend to the matter but the owners of the lorry did not turn up. That on the 12th May 2021 the Interested Party issued F89 No. 174666 to the OCS Marsabit police station to warehouse the goods ***in situ*** pending customs clearance. That since the owners have not availed themselves to customs and the goods have not been verified to ascertain their contents, quality and origin they are deemed to be under customs control. That on 24th May 2021 they were informed by Marsabit police that they were required in court on 25th May 2021 to explain the position of customs and grounds of

issuance of F89. The court made orders for the release of the lorry and the goods to the applicants. He made further orders suspending any criminal proceedings against the applicants within the jurisdiction; granted anticipatory bail to them and committed Raphael Mwaura to civil jail from that date up to 18th June 2021 for ostensibly being in contempt of court.

3. The Interested Party argues that the committal to civil jail of their officer was improper as he had no knowledge of the court order.

4. The application was opposed by the respondents through the replying affidavit of the 1st Applicant wherein he deposed that on the 8th May 2021 the lorry of the 1st applicant registration No. KDA 200A was intercepted by policemen from Marsabit police station on suspicion that it was transporting narcotic drugs. It was taken to Marsabit police station where it was searched and found to be carrying 434 bags of sorghum. The 2nd Applicant claimed ownership of the sorghum and said that he is a businessman and that he had bought the sorghum in Hurri hills within Marsabit county. That he had hired the lorry from the 1st Applicant to ferry the sorghum for sale in Meru county. Despite the explanation, the police detained the vehicle for 7 days. The police then forwarded an investigation file to the office of the DPP Marsabit, recommending that the applicants be charged with conveying suspected stolen goods. That upon perusal of the file the ODPP advised the 2nd respondent through a letter dated 4th may 2021 that the threshold for the intended charge had not been attained. They accordingly advised the 2nd respondent to release the vehicle. However, the 2nd respondent continued to detain the vehicle and the cereals.

5. On the 11th May 2021 the applicants filed an application of even date seeking for the release of the motor vehicle and the goods. The application was fixed for hearing on the 13th May 2021. It was served on the respondents. On the referred to date the 2nd respondent appeared in court with a notice dated 12th May 2021 from the Interested Party alleging that the goods were suspected uncustomed goods. The trial magistrate Hon. Ombija ordered the 2nd respondent to avail the Interested Party in court on the 17th May 2021 to explain about the notice. The court made further orders that the lorry be produced in court on the stated date. Come that date neither the respondents nor the Interested Party turned up in court. The magistrate thereupon issued an order for the 2nd respondent to release the lorry and the goods. The order was served on the 2nd respondent on the same day but the 2nd respondent declined to comply with the order. On the following day, 18th May 2021, the applicants` counsel went to the police station to seek for an explanation for non-compliance with the order wherein the 2nd respondent released the vehicle to the applicants. No sooner had the vehicle been released than when another police officer appeared with an e-mail from an officer of the Interested Party one Daniel Kioko addressed to the 2nd respondent with instructions that the vehicle and the goods should not be released.

6. With the said turn of events the applicants went back to court on the 20th May 2021 with a contempt of court application against the 2nd respondent. The same was heard on the 24th May 2021 and the ruling fixed for 25th May 2021, with further orders that the 2nd respondent presented the lorry before court. On the said date the Interested Party sent one of their officers, Mr. **Raphael Mwaura**, to attend the court session. The lorry was presented before the court and the trial magistrate, for the second time, ordered for the release of the lorry and the goods to the applicants. He made the other orders that are being challenged.

7. It is on the above background that the application for revision is being made. The High Court at Meru did release Raphael Mwaura on bond and granted stay of proceedings in the lower court pending the hearing and determination of the application.

8. The application proceeded by way of written submissions. The submissions by counsel for the Interested Party, **Mr. Osoro**, were confined to the issue of committal of their officer to civil jail. Counsel submitted that the standard of proof in cases of contempt of court is high and that the standard lies above balance of probabilities and below beyond reasonable doubt. He cited the case of **Gatharia K.Mutikika v Baharini Farm Ltd** (1985) KLR as cited in the case of **Katsuri Limited v Kapurchand Depar Shali** (2016)eKLR where it was stated that –

> **"the courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved…..it must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt… the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge…."**

9. Counsel submitted that the trial court did no satisfy itself that the threshold for contempt proceedings had been met which are as was stated in the case of **Samuel M. N. Mweru & Others v National Land Commission** & 2 Others (2020)eKLR where it was held that in a case of contempt it must be established –

> ***a)*** **That the order was clear, unambiguous and binding on the defendant.**
>
> ***b)*** **That the defendant had knowledge of or proper service of the terms of the order.**
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> ***c)*** **That the defendant acted in breach of the terms of the order.**
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> ***d)*** **That the defendant's conduct was deliberate.**

10. Counsel also cited the case of **Shimmers Plaza Limited v National Bank of Kenya Ltd** (2015)eKLR where the Court of Appeal considered the ingredients of the offence of contempt of court and held that –

> **"it is important however that the court satisfies itself beyond any shadow of doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the court for bidding it. This**

standard has not changed since the celebrated case of Ex parte Langley 1979, 13 Ch D, 110(CA) where Thesigier L J stated as follows at p. 119:

…..the question in each case and depending upon the particular circumstance of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of court that you can infer from the facts that he had notice intact of the order which has been made. And in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was a notice ought to prove it beyond reasonable doubt.

11. Counsel submitted that their referred to officer was only tasked by his office to attend the court proceedings of the day and had no knowledge of the court order. That there was no service of the order on him. That there was no wilful disobedience of the court order by the officer. That the trial magistrate was wrong in finding their said officer to be in contempt of court when there was no conclusive proof of the same.

12. The advocates for the applicants, **Maingi Kamau & Co Advocates**, on the other hand submitted that the Interested Party was aware of the court order as their officer made an appearance in court on the 25th May 2021. That the trial magistrate was therefore right in finding that the Interested Party was in contempt of court order. Further that the subsequent release of the lorry and the goods was lawful and justifiable. That the Interested Party has failed to mention in his application that they have detained the lorry and the goods at Isiolo. That the goods involved are perishable commodities. That the Interested Party is liable for loss incurred by the applicants.

Analysis and Determination -

13. The application is made pursuant to the provisions of section 362 of the Criminal Procedure Code that 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.

14. It is clear from the provisions of the section that the powers of the High Court on revision of an order of a subordinate court are confined to revising orders that appear inaccurate, incorrect or illegal.

15. The orders being sought to be revised are release of the motor vehicle and its goods to the applicants; committal of the officer of the Interested Party to civil jail; suspension of criminal proceedings against the applicants and the granting of anticipatory bail on them.

16. I have considered the grounds in support of the application, the grounds in opposition thereto and the submissions by the advocates for the respective parties. The question is whether there are any grounds for this court to interfere with the orders issued by the trial court. I do proceed to consider the merits of the application as hereunder.

Release of motor vehicle –

17. The submissions for the advocate for the Interested Party did not touch on this issue. It is not in dispute that the Interested Party was summoned to appear in court on the 25th May 2021 to explain the grounds of issuance of F89. They do not seem to have given any. They did not file any papers to oppose the application to release the vehicle. In view of the foregoing, the Interested Party has not shown that the orders issued by the court for the release of the vehicle and the goods were improper or illegal. The fact is that they were given an opportunity to be heard before the orders were made. There is no illegality ascribed to the trial court in issuing the orders.

18. Besides the foregoing, the case was investigated by the police from Marsabit police station. The investigating officer alleged that the sorghum was stolen or was part of relief food supplies. A file was forwarded to the office of the DPP who reviewed the evidence and advised the OCS through a letter marked "AR2" dated 4th May 2021 that there was no evidence that the sorghum was stolen or that it comprised of relief food supplies. The letter noted that the explanation by the suspects that they bought the sorghum at Hurri Hills was confirmed by the area chief who stated that the suspects have a store at the said place for use in storing farm produce bought from local farmers.

19. If then the office of DPP found the explanation by the applicants that they bought the sorghum from Hurri Hills to be plausible, what evidence does the officers of the Interested Party have that the farm produce was from a neighbouring country? If they had such evidence why did they not present it before the trial magistrate when they were given an opportunity to do so? That notwithstanding, they have not indicated to this court that they have new evidence in the case to show that the goods were uncustomed goods. It is clear that the interested party have no evidence that the subject goods are uncustomed goods. No substantive ground has been laid out to warrant revision of the order for release of the lorry and the goods.

Question of anticipatory Bail and suspension of criminal proceedings against the applicants -

20. The trial court granted bail to the applicants and suspended any criminal proceedings against them. Bail is a constitutional right as provided by Article 49(h) of the Constitution of Kenya 2010 that an arrested person has a right to be released on bond or bail pending charge unless there are compelling reasons not to be so released. In my view this right to bail extends to anticipatory bail. Such bail is usually granted where there is alleged to be serious breach of a citizen`s right by an organ of the state which is supposed to protect it – see **Samuel Muchiri W`Njuguna v Republic** (2004) 1KLR 520. In the same case it was also stated that in granting such bail the court would be exercising its supervisory powers to prevent abuse of the powers granted to the executive to the detriment of an individual.

21. The principles under which anticipatory bail can be granted are well settled. An applicant has to show that there is reasonable apprehension that his rights are likely to be violated. In **Martin Nyaga Wambora v Speaker of County Assembly of Embu & 3 Others** as

cited in Pamela Akinyi Odhiambo v Ethics & Anti-corruprion Commission (2018)eKLR it was held that such apprehension must be real. Said the court –

"To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention."

22. Such was the position in the case of **Mandiki Luyeye v Republic (2015) eKLR** where it was held that –

"Similar sentiments were observed in the case of Eric Mailu vs Republic and 2 others Nairobi Misc. Cr. Application No. 24 of 2013 in which it was emphasized that anticipatory bail would only issue when there was serious breach of a citizen's rights by organs of state. Accordingly, it is salient that anticipatory bail is aimed at giving remedy for breach of infringement of fundamental Constitutional rights in conformity with what the Constitution envisages constitutes protection of fundamental rights and freedoms of a citizen. It cannot issue where an Applicant labours under apprehension founded on unsubstantiated claims. The fear of breach to fundamental right must be real and demonstrable. An Applicant must demonstrate the breach by acts and facts constituting the alleged breach."

23. It is also a principle of law that in granting such orders the court should not interfere with the power vested on investigative bodies by the law to investigate crime. In the case of **Republic v Chief Magistrate Milimani & Another exparte Tusker Mattresses Limited & 3 Others** (2013)eKLR it was stated that-

"**However before going to the merits of the instant application it is important to note that what is sought to be prohibited is the continuation of investigation rather than a criminal trial. The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. That this Court has power to quash impugned warrants cannot be doubted. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the police to investigate allegations of commission a criminal offence ought to be interfered with. It is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well as civil liability. The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so."**

24. In the present application there is no argument advanced by the Interested Party that the granting of anticipatory bail to the applicants was unlawful. It is apparent that the police had refused to release the applicants` motor vehicle and goods even after advice by the ODPP and even after the court had made an order of release. There was real danger of the rights of the applicants being infringed by the police through arrest. The granting of anticipatory bail was lawful. There is then no reason for me to interfere with the order.

25. I have perused the proceedings of the lower court in Marsabit Misc. Application No.E024 of 2021.The trial magistrate seems to have made the order for suspension of criminal proceedings against the applicants **suo moto** when there was no application by any of the parties to that end. More so, the issue was not argued before the magistrate. It is a cardinal principle of law that a party should not be condemned unheard. The ramifications of the order touched on the powers of investigative bodies to investigate crime. Such power cannot be interfered with without solid grounds. It was only fair and just that such an order be made upon the issues being canvassed by the parties. In my view the order was improper and that ought to be corrected by way of revision.

Question of committal to civil jail –

26. It is of utmost importance that court orders be complied with as failure to do so compromises the dignity of courts of law. In **Samuel M.N. Mweru & Others v National Land Commission & 2 others** the court considered the importance of compliance with court orders and held that –

It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of courts is upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.

It is the duty of the court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with contemnors. The court does not, and ought not be seen to make orders in vain; otherwise the court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.

See also **Kenya Human Rights Commission v Attorney General & Another** (2018)eKLR.

27. The threshold for committal to civil jail for failure to comply with a court order are well articulated in the authorities cited by the advocate for the Interested Party. What has to be emphasized is that before one can be so committed there has to be proof of the following:

(i) The terms of the order;

(ii) Knowledge of these terms by the respondent;

(iii) Failure by the respondent to comply with the terms of the order; and

(iv) That the respondent`s conduct was deliberate.

See **Samuel M.N.Mweru & Others v National Land Commission & 2 others** (supra).

28. The standard of proof in cases of contempt is higher than a balance of probabilities but below beyond reasonable doubt. In **Republic v Ahmad Abolfathi Mohammed & Another (2018)eKLR** the Supreme Court held as follows on the issue –

> **28] It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen. We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of Mutitika v. Baharini Farm Limited [1985] KLR 229, 234 the Court of Appeal held that:**
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> **"In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature."**
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> **[29] The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.**

29. Bearing the above principles in mind, the question is whether it was proved that the officer of the Interested party was in contempt of court before the order for committal was issued. It is clear from the depositions placed before the court that the officer of the Interested Party, Raphael Mwaura, was only sent by his office to go to court to explain the position of F89. There is no evidence that he was aware of the court order and its terms. It is not him who wrote the e-mail requesting the OCS not to release the vehicle and the goods. The same was written by another officer by name of Daniel Kioko. It is this officer and the OCS who should have been cited for contempt of court as they entered into a backyard arrangement not to release the vehicle well aware that the court had issued an order to release it. This is evidenced by the e-mail by Daniel Kioko to the OCS. It was the height of impunity on the part of the official of the Interested Party to issue "orders" to the OCS not to release the vehicle well aware that the court had made an order for the vehicle to be released. The best that the Interested Party could have done in the circumstances was to approach the court to have the order lifted and not to issue contrary "orders." That the Interested Party subsequently impounded the vehicle at Isiolo after failing to defend their issuance of F89 in court portrays flagrant disregard of due process. The argument that the vehicle is still deemed to be under custom control by virtue of issuance of F89 is all hot air as the officials of the Interested Party were unable to defend the same in court when they were given an opportunity to do so.

30. It is hence clear that there was no evidence that Mr. Raphael Mwaura had deliberately failed to comply with the court order before he was committed to civil jail. He seems to have been the foul guy caught up between the supremacy war between the court, the police and the Interested Party. There was manifest injustice in committing Mr. Raphael Mwaura to civil jail. I am inclined to correct such injustice by way of revision pursuant to the provisions of section 362 of the Criminal Procedure Code.

31. The upshot is that I do not find any merit in the prayer to revise the order for the release of the subject lorry and its luggage as well as the prayer to set aside the order for anticipatory bail. The two prayers are in the premises declined. I do however find merit in the prayer to quash the order for committal to civil jail of Mr. Raphael Mwaura and the order suspending criminal proceedings against the applicants. The order for committal of Mr. Raphael Mwaura to civil jail is thereby quashed and the officer set at liberty forthwith. The order suspending criminal proceedings against the applicants is similarly revised and is set aside.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 15TH DAY OF OCTOBER 2021.

JESSE N. NJAGI

JUDGE

In the presence of:

Mr. Behailu for Applicants

N/A for Interested Party

Applicants 1st Present

Respondents - Absent

Interested Party - Absent

Court Assistant - Mr. Godana