



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO.E0 40 OF 2021

JAMES GITARI SAMUEL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Ruling and Order in Misc. Criminal Application case No.E077 of 2021 of the

Chief Magistrate's Court at Homa Bay by Hon. J.M. Nangéa –Chief Magistrate)

JUDGMENT

1. On 26th October, 2021 the appellant moved the court by way of Notice of Motion under section 177 of the Criminal Procedure Code and Article 40 of the Constitution of Kenya. He was seeking an order for the release of motor vehicle KBZ 426Y pending the determination of Homa Bay Criminal case No. E095 of 2021.

2. The appellant contended that he was not a party to the commission of the offence for which the motor vehicle was impounded; he was the registered owner.

3. After hearing the application, the learned trial magistrate struck it out for want of jurisdiction.

4. The appellant was aggrieved and filed this appeal. He was represented by the firm of Ongoso & Company Advocates. The appellant raised seven grounds of appeal which can be summarized as follows:

a) That the learned trial magistrate erred in holding that he lacked jurisdiction.

b) That the learned trial magistrate erred in law and facts by failing to appreciate the averments of the appellant.

5. The respondent conceded the appeal through Mr. Ochengo, learned counsel who argued that the release ought to be conditional.

6. Section 177 of the Criminal Procedure Code provides:

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—

(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.

7. The application by the appellant ought to have been made before the court seized of the criminal trial so that a just and fair conclusion could be arrived at. It was erroneous for the applicant to open a different file from the one where the offences that caused the lorry to be impounded were being tried.

8. In Homa Bay Criminal case NO. E095 of 2021 the accused therein were charged under the Forest Act of 2005, now repealed. Section 76

of Forest Conservation and Management Act No. 34 of 2016 provides:

The Forests Act, 2005 (No. 3 of 2005) and Timber Act (Cap. 386) are hereby repealed.

9. The application for the release of the motor vehicle ought to be made to the court seized of the matter and which must bear in mind whether the section under which the accused therein will be charged calls for the forfeiture of the vessel transporting the forest produce in the event of a conviction. If there is no forfeiture clause, it is prudent to release the vehicle conditionally to the registered owner.

10. It is incumbent on the court taking plea to first check if the charge is correct in all aspects to avoid scenarios where people are charged under repealed law unless the circumstances of the offence allow the same.

DELIVERED AND SIGNED AT HOMA BAY THIS 25TH DAY OF NOVEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE