



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION NO E106 OF 2021

ELIUD MWANIKI WAWERU.....1ST APPLICANT

RAFIKI DEPOSIT TAKING MICROFINANCE (K) LTD.....2ND APPLICANT

VERSUS

THE DIRECTORATE OF CRIMINAL INVESTIGATIONS, KIAMBU....1ST RESPONDENT

THE NATIONAL POLICE SERVICE.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

ASSESTS RECOVERY AGENCY.....4TH RESPONDENT

WUYU GABAYO TILO.....5TH RESPONDENT

RULING

The case for the applicant

The applicant has applied for the following orders.

- 1) Spent
- 2) To grant an interim conservatory order staying the ruling delivered on 5th May 2021 in the lower court, in the Chief Magistrate's court at JKIA-Nairobi, in Criminal Case No. MCCR/E.034 of 2020, pending the hearing and determination of this revision.
- 3) To make an order to call for and examine the record of the proceedings in the Chief Magistrate's court at JKIA- Nairobi in Criminal Case No. MCCR/E.034 of 2020, for the purpose of satisfying itself as to the correctness, legality or propriety of the ruling recorded on 5th May 2021.
4. To make an order to vary or set aside the ruling of the said court dated 5th May 2021.

The application is based on the following two grounds. First, the trial magistrate failed to use his judicial discretion and in doing so he denied in returning the suit motor vehicle to the applicant pending the hearing and determination of the trial in the Chief Magistrate's court at JKIA-Nairobi, in Criminal Case No. MCCR/E.034 of 2020.

Second, the court arrived at the wrong conclusion as a result of alluding to the wrong facts.

The application is also supported by the applicant's 32 paragraphs supporting affidavit, whose contents I find unnecessary to set out herein; in view of the nature of the instant applicant.

The case for the Republic through the DCI ANTI NARCOTICS UNIT.

The Republic through No. 98045 Cpl. Grace Njoroge has filed a 12 paragraphs replying affidavit in opposition to the application; whose

contents I find unnecessary to set out herein; in view of the nature of the instant applicant.

The ruling and order sought to be revised.

I have perused the ruling and order sought to be revised. In part the learned Chief Magistrate (L.O. Onyino) concluded in his ruling that: “*In the circumstances of this case, application of the decision in the case of Elijah Nyakebondo –V- Republic (2017) e-KLR quoted herein above is appropriate; and therefore this court will, in the interest of justice to all the parties in the case, await production of the motor vehicle in question as an exhibit after the arresting officers, and the investigating officer give their evidence in relation thereto and the accused persons given a chance to cross-examine them in respect of thereof.*”

In the circumstances, and for these reasons, the application is hereby declined, and is dismissed.”

Issues for determination

After perusing the ruling and order sought to be revised in the light of the applicable law, I find that the following are the issues for determination.

- 1 Whether it is necessary to file affidavits and submissions in an application for revision.
- 2 Whether the ruling and order sought to be revised are ripe for revision.

Issue 1

The revisionary jurisdiction of this court is of a limited nature. This is clear from the provisions of section 362 of the Criminal Procedure Code (Cap 75) Laws of Kenya, which reads as follows:

“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.”

It is clear from the foregoing that it is not necessary to resort to filing of affidavits and submissions in support of or in opposition to an application for revision. The reason being that the revising court, is only allowed to peruse the record of the proceedings and then proceed to satisfy itself that the procedure in the lower court was regular. Additionally, the revising court must also satisfy itself that any finding, sentence or order recorded is authorized by law.

In view of the foregoing this court (Bwonwong’a, J) in Republic v. Shadrack Savali Mwangami, Consolidated with Housing Financing Corporation of Kenya v Shadrack Savali Mwangami & Another, Nairobi High Court Criminal Revision Nos 23 and 31 of 2020, found that it was not desirable to file affidavits in applications for revision and proceeded to pronounce itself as follows:

“It is undesirable to file affidavits in applications for revision of orders that have been brought to the attention of this court. What is required of an applicant in a revisionary application is for him to state the reasons why revision is necessary. This will enable the High Court at a glance to see the substance of the application. See generally Uganda v Welli (1966) EA 324. Submissions that are common place in trials or hearing of appeals are undesirable. It is important to point out that the High Court is not bound to revise an order or to hear any party; since the exercise of revisionary powers by the court is discretionary.”

It is for the foregoing reason that I found it unnecessary to set out the contents (averments) of the affidavits and the submissions of parties.

Issue 2

It is trite practice that mid-trial findings and orders, that is, interlocutory orders, are not subject to revision. If this were so, it would lead to delay and inconvenience to the parties. It is only final orders that are subject to be revised.

In view of the foregoing it is clear from the ruling and order of the trial court that the arresting and investigating officers had not testified in court. And further that the subject vehicle had not been produced as an exhibit. In other words, the case is still pending hearing and determination in the lower court.

Additionally, the accused are charged with an offence that provides for forfeiture of the subject motor vehicle. The issue of forfeiture can only be determined at the end of the trial in terms of section 389 of the Criminal Procedure Code (Cap 75) Laws of Kenya. This also militates against the release of the subject motor vehicle.

In the premises, the application of the applicants is premature and is hereby struck out as it is not ripe for revision. The applicants need not be reminded that under section 9 of the Victim Protection Act of 2014, they have a right to participate in the trial process to protect their interests; since the applicants are mortgagors in relation to the mortgagee (Rafiki Deposit Taking Microfinance (K) Ltd).

There will be order as to costs; because this is an application that arose out of criminal proceedings and no case has been out for such an order. In the premises the applicants’ application is hereby dismissed.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF DECEMBER 2021.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua court assistant

Ms. Njihia holding briefing for Mr. Kansime for the 1st and 2nd applicants.

Ms Gichuhi for the Republic/respondent.