



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL REVISION NO. 23 OF 2020

REPUBLIC.....PROSECUTOR/APPLICANT

V E R S U S

SHADRACK SAVALI MWONGAMI.....ACCUSED/RESPONDENT

CONSOLIDATED WITH

CRIMINAL REVISION NO. 31 OF 2020

HOUSING FINANCING CORPORATION OF KENYA.....APPLICANT

VERSUS

SHADRACK SAVALI MWONGAMI.....ACCUSED/RESPONDENT

MUEMA MATIVO.....INTERESTED PARTY

(Arising from the original Chief Magistrate’s Court at Nairobi in Criminal Case No 2013 of 2019, Republic versus Shadrack Savali Mwangami)

ORDER IN REVISION

The issue before me is in respect of the two consolidated applications for revision of the order dated 6/2/2020 made by the learned Senior Resident Magistrate (Hon. C. Muthoni) in which she ordered the release of motor vehicle registration No. KBB OO2X from police custody to Muema Mativo the registered owner. The said learned Senior Resident Magistrate additionally ordered that the said motor vehicle should not be disposed of or sold during the pendency of the matter since the parties were “*negotiating on 12/3/2020 to confirm the position.*”

On 8/11/2021 counsel for the parties appeared before me and directions were given in respect of the disposal of the two consolidated applications. In the first application the Republic was the applicant, while in the second application Housing Financing Corporation of Kenya is the applicant. Counsel for the parties had filed their submissions in addition to their affidavits.

The two applicants are seeking revision of the said magisterial order dated 6/2/2020. In this regard, the record of the proceedings in the lower magisterial court and the order made by that court will guide this court in this application for revision as directed by the provisions of section 362 of the Criminal Procedure Code (Cap 75) Laws of Kenya; which provisions read 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 statutory provisions and the terms of the order sought to be revised that it was not necessary for the parties to file formal applications. It therefore follows that I am only required to peruse the record of the magisterial proceedings and the resulting order.

That record shows that the accused/respondent (Shadrack Savali Mwangami) was charged with the offence of fraudulent disposal of a mortgaged goods namely a motor vehicle registration make Isuzu FSR registration number KCG 981R Chassis number JALFTRR33H7000825 valued at Ksh five million four hundred sixty nine thousand, seven hundred fifty shillings (Ksh 5,469,750/=); which he allegedly disposed of without the consent of the mortgagee namely Housing Financing Corporation of Kenya Ltd with intent to defraud.

The record further shows that on the 6th February 2020 counsel for the accused/respondent informed the court that they were negotiating with a view to reaching an out of court settlement in the matter on that day. The file was then placed aside. Later counsel for the accused then informed the court that the accused/respondent was the registered owner of the subject motor vehicle. Counsel also informed the court that his client was willing repay the loan.

In response to the foregoing the prosecution stated that they did not have any objection. The prosecution then informed the court that the motor vehicle could be released since the accused person was willing to repay the loan and that there was no point of detaining the vehicle.

The court then proceeded to order for the release of motor vehicle registration number KBB 002X to the accused/respondent. The court then added that: *“The said motor vehicle not to be disposed off or sold during the pendency of this matter since the parties are “negotiating on 12/3/2020 to confirm settlement.”* Additionally, the court ordered that: *“For the avoidance of doubt, the m/v be released to Muema Mativo the reg. owner of the said m/v.”*

The foregoing record shows the position of the Housing Financing Corporation of Kenya as the mortgagee; since they advanced a loan facility to the accused/respondent.

The case for the prosecution

The prosecution filed written submissions in support of setting aside of the order of the learned magistrate. Counsel for the prosecution cited *Hirani v Kassam (1952) EACA 131*, which stands for the proposition that a consent order may be set aside if it was obtained by fraud or collusion or by an agreement contrary to the policy of the court.

The case for Housing Financing Corporation of Kenya Ltd.

As the mortgagee they applied for the setting aside of the order of the learned magistrate since it was irregularly obtained; for their consent had not been obtained by the accused/respondent.

The replying affidavit of the accused/respondent namely Shadrack Savali Mwongami.

The case for the Accused/Respondent

The accused/respondent deposed to a 31 paragraphs replying affidavit in opposition to the two applications for revision. He supported the order made by the learned magistrate. He deposed to the following major matters. Before he was arrested the accused/respondent was negotiating with mortgagee (Housing Financing Corporation of Kenya Ltd); in respect of repaying the loan to the mortgagee. He further deposed that he has no claim to the said motor vehicle. He also deposed that the registered owner in Muema Mativo.

The case for the Interested party – Muema Mativo

The interested party has deposed to a 32 paragraphs replying affidavit in opposition to the revision.

He has deposed that he uses the vehicle for harvesting sand and that Housing Financing Corporation of Kenya Ltd did not advance a loan to him.

Issues for determination.

I have considered the affidavits of the parties and their written submissions. I find the following to be the issues for determination.

- 1) Whether the proceedings were regularly conducted.
- 2) What are the appropriate orders that ought to be made.
- 3) Whether it is mandatory that parties in revisionary proceedings should file affidavits

Issue 1

It is clear from the record that the subject motor vehicle was ordered released to the registered owner namely Muema Mativo; who on the face of the record was a stranger to the proceedings. The said motor vehicle had not been produced as an exhibit. It therefore follows that the learned magistrate did not have jurisdiction over the said motor vehicle in view of the fact that the complainant (Housing Financing Corporation of Kenya Ltd) was not involved in that process. This was irregular. The conduct of the counsel for the accused in informing the court that the accused was willing to repay the loan and there being no objection by the prosecutor did not operate to confer jurisdiction upon the learned magistrate to order for the release of the motor vehicle. For jurisdiction can only be conferred by statute or the constitution.

The order of the court was contradictory since the parties were negotiating with a view to confirm a settlement; it was not open to the court to proceed and order that the vehicle be released to the registered owner namely Muema Mativo. This is clear from the terms of the order which was couched in the following terms: *“The said motor vehicle not to be disposed off or sold during the pendency of this matter since the parties are “negotiating on 12/3/2020 to confirm settlement.”.....“For the avoidance of doubt, the m/v be released to Muema Mativo the reg. owner of the said m/v.”* This is yet another irregularity.

It is clear from the charge sheet that the complainant was Housing Financing Corporation of Kenya Ltd, and the subject of matter in the case was that motor vehicle, it was highly irregular for the court to order for the release of the motor vehicle to a stranger (Muema Mativo) in the absence of evidence to demonstrate as to who was the owner and in view of the fact that Housing Financing Corporation of Kenya Ltd had a beneficial interest in the subject motor vehicle. The proprietary rights of Housing Financing Corporation of Kenya Ltd in that motor vehicle were threatened with being infringed by that court order.

In the circumstances I find that the order of the learned magistrate was irregular and I hereby set it aside.

Issue 2

Since the learned magistrate had made a final order in these proceedings, it is only fair that the trial of the case be conducted by another magistrate of competent jurisdiction. In the circumstances, pursuant to the powers conferred upon this court by section 354 (3) (a) (i) as read with section 364 (1) (b) of the Criminal Procedure Code (Cap 75) Laws of Kenya, I hereby direct the trial of the accused be heard and determined by a Magistrate of competent jurisdiction other than the one who ordered the motor vehicle to be released to Muema Mativo.

Issue 3

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.

In the instant application the parties filed lengthy affidavits and submissions replete with authorities which was undesirable and uncalled for.

In the premises, the final orders are as follows.

1. The magisterial order is hereby set aside.
2. The accused is to be tried before another Magistrate of competent jurisdiction.
3. No order as to costs.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 21ST DAY OF DECEMBER 2021.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Quintus court assistant

Ms. No appearance for the 1st applicant

Mr. Mutua for the 2nd applicant

Mr. Mutinda Kimeu for the respondent

Mr Kamanda for the interested party