



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL REVISION NO 526 OF 2020

BHAVIN DEVJI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDANT

RULING

1. This ruling arises out of the determination by Hon. C. Muthoni SRM in Misc. Criminal Application No. 638 of 2020 wherein the said Magistrate issued a search warrant to gain entry into the applicant's residential Apartment and business premises to search for and seize and carry as exhibits electronic communication gadgets that were linked to communication of the offence of extortion contrary to Section 300(1) (a) of the Penal Code in which the applicant was a suspect.

2. In execution of the warrant, the investigating officer seized and carried one mobile phone, one lap top, one Kenyan passport belonging to the applicant's father and one United Kingdom of Great Britain and Northern Ireland passport belonging to the applicant.

3. Being aggrieved by the said execution, the applicant filed a Notice of Motion application under certificate of urgency in which he sought that the Honourable Court to be pleased to verify the order dated 21st February 2020 and to cite the investigating officer CPL CHARLES ODHIAMBO for forgery of the said search warrant, he also sought a temporary order to be issued for the return of the items named therein and a further order restraining the respondent from carrying further search and or harassing the applicant.

4. The said application was supported by the affidavit sworn by the applicant's father in which he deposed that the warrant issued by the court did not name the issuing Magistrate and was therefore a forgery. It was contended that the property searched did not belong to him and neither did it give power to seize the passports and therefore violated their dignity.

5. That application was heard inter partes and by a ruling dated 29th May, 2020 the trial court dismissed the same and as regards the passports stated as follows:

“It is my considered view that the investigating officer was within his mandate to conduct investigations as guided by investigation rules. To that end, he seized property to aid him in investigations belonging to the applicants to present them before court to be charged on 4/6/2020. I will therefore allow the investigating officer to retain the said passports until 4/6/2020 when the applicants will be presented before the plea court. The application for the release of the applicants' passports to be revisited before the plea taking court on 4/6/2020”.

6. Aggrieved by the said decision the applicant moved this court by a way of several emails in which he stated among other things that the said ruling constituted a gross injustice as the trial magistrate was negligent in handling the file without clarifying which court had issued the warrants and that even if the warrant was authentic, then it was executed in an illegal manner.

7. The matter was placed before Mutuku J, who issued directions that it be served upon the respondents on 15/6/2020, parties to file their written submissions thereon by 17/6/2020 and hearing dates thereon fixed at the registry. On 25th June 2020 the file was placed before me for directions, when the applicant stated that his complaint was on the search warrant which did not have the name of the issuing magistrate and the seized passport which was not included in the warrant.

8. At the hearing of the application, the applicant submitted that his name was not included in the search warrant and that the said passports were also not included. He submitted that the trial court refused to give them the passports and that one of the mobile phones taken was bought a day after the search was conducted.

9. In opposing the application, Mr. Momanyi submitted the applicants' complaint was on the manner in which the warrant was conducted

which was settled by the lower court. He submitted that the passports were retained so that the applicant may not get out of the country and that Section 121 of the CPC was complied with as regards the same. It was submitted that they were retained as terms for the grant of bond in a criminal charge the applicant is facing and any allegations of violation of constitutional rights should be handled by way of a petition filed under the provisions of Article 22(3) of the Constitution.

DETERMINATION.

10. From the material presented before me, it is clear that the applicant's application herein is for revision of the orders issued by Hon. C Muthoni as regards the warrant of search and retention of the passports seized as a result of the said search. The revision power of this courts is constitutionally and statutory given under Article 165(6) and (7) and Section 362 Criminal procedure Code which empowers the court to call for any proceedings before the subordinate court to examine its records so as to satisfy itself as to the correctness, legality or propriety of any finding.

11. In exercising the powers of revision, the court is not sitting on appeal from the decision of the lower court but only invoking its supervisory jurisdiction where there are glaring acts or omission on the part of the trial court leading to a miscarriage of justice. In the case of **GEORGE ALADWA OMWERA V. R [2016] eKLR** I set out the said powers in the following terms: -

“In exercising supervisory jurisdiction under Article 165(6) the court does not exercise appellate jurisdiction and therefore cannot review or reweigh evidence upon which the determination of the lower court is based, it can only demolish the order which it considers erroneous or without jurisdiction and which constitutes gross violation of the fair administration of justice but does not substitute its own view to those of the inferior tribunals.”

23. In **VEERAPPA PILLAI v REMAAN LTD** the Supreme court of India has this to say: -

“The supervisory powers are obviously intended to enable the High court use them in grave cases where the subordinate tribunal or bodies or officer acts wholly without jurisdiction or excess of it or in violation of the principles of natural justice or refuses to exercise jurisdiction vested in them or there is an apparent error on the face the record and such action, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide and large as to enable the High Court to convert itself into a Court of Appeal and examine for itself the correctness of the decision impugned and decide what the proper view on the order be made....”

24. *The above principle is applicable to the exercise of revision jurisdiction of the court wherein the court too cannot sit in appeal and re-appreciate the evidence. It is only exercised to correct the manifest error in the order of the subordinate courts but should not be exercised in a manner that turns the Revisional court into appeal. The jurisdiction cannot be exercised mainly because the lower court has taken a wrong view of the law or misapprehended the evidence tendered. See **PATHUMMAA & Anor v. MUHAMMED 1986 (2) SCC 585** where it was stated that in revision jurisdiction the High Court would not be justified in substituting its own view for that of the magistrate on question of facts.”*

12. In this matter the applicants' complaint is that the warrants were not complete and that the same was executed in an illegal manner, his other complaint is that the trial court declined to order for the release of the passports which were seized as a result of the search. I have examined the records of the lower court and the ruling on the passports as set out herein and am unable to find any illegality thereon. From the record it is clear that the applicant's complaint is on the mode of the execution of the said warrants for which he had sought an order to cite the investigation officer in contempt which he can still prosecute before the trial court.

13. The fact that the said warrants did not have the name of the issuing judicial officer does not make them unlawful. It is clear that the same was issued by the court. If the Investigation Officer went beyond the scope of the said warrant, that cannot be vested upon the trial court. As regards the release of the passports, the applicant's application was rather premature as the same was to be handled by the plea court. There is evidence, uncontested that the applicant has since been lawfully charged as a result of evidence obtained through the search and at all other issues raised in this application shall constitute his defence at his trial.

14. I therefore find no illegality on the orders issued by the lower court and it follows that the application before the court lacks merit and is accordingly dismissed and this revision file closed. The applicant however has a right of Appeal.

15. The applicant has the liberty to raise the issues for the release of his passport with the trial court now that the same has confirmed that he has been charged with criminal offence in criminal case No. 1947/2020 wherein he has been released on bond the terms of which is the subject of Misc. Revision case No.545/2020 pending for determination before another court. I therefore direct that the lower court file be returned back either to be closed or consolidated with criminal case No. 1947/2020 as the court deems fit.

Signed dated and delivered at Nairobi this 17th day of September 2020 Through Microsoft Teams

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J. WAKIAGA

JUDGE

In the presence of:-

Applicant in person

Mr. Naulikha for Ms Nyauncho for the Respondent

Karwitha court assistant