



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL DIVISION

CRIMINAL REVISION NO.E3 OF 2020

JOSEPH KITHUKU KITONGA.....1ST APPLICANT

MUKI HARDWARE AND DISTRIBUTORS.....2ND APPLICANT

VERSUS

OFFICER IN CHARGE OF POLICE STATION BAMBURI.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

MARTIN MUTHOMI GITUMA.....3RD RESPONDENT

JOMAKI ENTERPRISES.....4TH RESPONDENT

RULING

Applicant's Case

1. By Certificate of Urgency dated 2nd November, 2020 and Supporting Affidavit sworn by Joseph Kithuku Kitonga the Applicant pursuant to Sections 362 and 364 of the Criminal Procedure Code (Cap 475) Laws of Kenya prays for this court to revise the decision of Honorable D. Odhiambo, Resident Magistrate, Shanzu where the Court issued the following Orders:-

- i. The Respondent to expedite the investigation regarding the whereabouts of Dennis Onsongo and Bernard Momanyi for purposes of arresting and charging them as per the Orders in Misc. No. EO10 and as suggested by the DPP;**
- ii. The Respondent through the Investigating Officer to take photos of the 297 bags of cement;**
- iii. The Respondent to release the 297 bags of cement to MARTIN MUTHOMI GITUMA and JOMAKI ENTERPRISES (the applicants) within 24 hours;**
- iv. Each party to bear own costs.**

2. The applicant in his supporting affidavit avers that the Applicants made a complaint at the Bamburi Police station for the loss of 700 bags of cement to fraudsters and 297 bags of unused cement bags were recovered at the proposed Mama Ngina Girls High School Construction site in Shanzu on 1st October, 2020 where the cement was in the process of delivery to be paid for upon delivery and that the 3rd Respondent has since been arrested and is out on bond.

3. He further avers that the 297 bags are still being held up at Bamburi Police Station and that the cement is at a risk of becoming useless and applicant's business to incur a loss and thus the application on 13th October, 2020 before the Honorable D. Odhiambo, Resident Magistrate, Shanzu where the Court issued the aforementioned orders and subsequently, the Current Revision Application.

Respondent's Case

4. The 1st Respondent in response to the Application filed a Replying Affidavit sworn on 6th November, 2020 by No. 68766 CPL RICHARD CHERUIYOT who avers to be the Investigating Officer in Criminal Case No. 6179 of 2020 Republic Versus Martin Muthomi Githuma where the 3rd Respondent is charged with the offence of Obtaining Money by False Pretense. He further avers that both the Applicant and the 3rd Respondent made applications on Criminal Miscellaneous No. E015 of 2020 each praying for the release of the 297 bags of cement.

5. The deponent avers that at the time of both applications investigations were ongoing and same were placed under the custody of Bamburi Police Station as the bags of cement are to be used as exhibits and therefore for the trial court to order the release of the bags of cement to the 3rd Respondent is a pre determination of the Criminal Case and tantamount to declaring ownership of the case. He further states that no reason has been advanced by the learned magistrate in support of his orders and avers to be in support of the revision herein.

6. The 2nd Respondent similarly filed a Replying Affidavit sworn on 6th November, 2020 by THERESA MWANGEKA who states to be a Prosecution Counsel exercising powers of the DPP under Article 157(9) of the Constitution and Section 29 of the Office of the DPP Act No. 2. She avers that the ruling by the Learned Magistrate for the release of the bags of cement to the 3rd Respondent at this juncture meant he had effectively determined the ownership of the said bags of cement which matter ought to be canvassed at the trial stage and that no legal reason has been given by the Learned Magistrate. She further avers that the trial Court misdirected itself on the application of Section 121 of the Criminal Procedure Code as there were no peculiar circumstances to warrant the trial Court to deem so and prayed for this revision to be allowed.

7. The 3rd Respondent filed a Replying Affidavit sworn on the 11th November, 2020 and avers to be one of the foremen of JOMAKI ENTERPRISES the 4th Respondent. He avers that the Applicant's Application is lacking merit and only aimed at stopping and/or frustrating the 3rd and 4th Respondent's efforts to enjoy the fruits of a ruling properly obtained. He states that the Court had no jurisdiction to grant the orders sought under Section 121 of the Criminal Procedure Code as no case had been instituted nor heard by the trial court. He further states that the 3rd and 4th Respondents acquired 700 bags as bona fide purchasers for value without notice through oral contact of sale with Dennis Onsongo and Bernard Momanyi (jointly referred to as "the seller") for money consideration on 29th October, 2020, that on 30th October, 2020 the seller delivered the 700 bags at around 0800hours to the construction site while in company of the Applicant's servants/agents (driver, supervisor and turnboy) whereby the 3rd and 4th Respondents proceeded with the ongoing constructions and had utilized 403 bags of cement by close of business.

8. He then states that payment was then done at 1700hours to one Dennis Onsongo and Bernard Momanyi Makori and confirmed through MPESA receipts by one of the employees of the 4th Respondent and that at around 1800hours the Applicant's supervisor went and recorded a complaint at Bamburi Police Station whereby the 3rd Respondent was arrested and released on cash bail of Ksh.50,000/= after Police had seized the remaining 297 bags.

9. He avers that there is no proof of any sale and delivery from the Applicants to the 3rd and 4th Respondent as the delivery notes were from Bamburi Cement to Muki Hardware Distributors Limited. He further states that the Applicant is precluded by conduct from denying that a good title passed to the 3rd and 4th Respondent as sale and delivery was done by the seller in synergy with the Applicant's Agents and/servants as evidenced by statements recorded at the police station and in particular the Applicant's driver. He avers that the Applicant's Application is otherwise unmeritorious as the Applicant's have not demonstrated how the trial magistrate had made a mistake or breached the law.

Analysis and Determination

10. Having considered the Application, Responses thereto as well as submissions by parties the issues for determination would be:-

i) First, does the Court have the jurisdiction to entertain the Revision request under the present circumstances?

ii) Was the trial Court justified in arriving at the decision to release the 297 bags of cement to the 3rd Respondent?

11. On the first issue this is a request for revision of orders made by the trial court in regards to 297 bags of cement that both the Applicant and 3rd and 4th Respondents Claim ownership of. The powers of the High court in revision are contained in Section 362 through to 367 of the Criminal Procedure Code (cap.75). Section 362 specifically provides as follows:-

"362. 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".

12. The powers of the High Court under its revision jurisdiction is stated under section 364 of the Criminal Procedure Code Cap 75, which states as follows:-

"364.(1) in the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High court may -

a). In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;.

(b) In the case of any other order than an order of acquittal, alter or reverse the order.

2. No order under this section shall be made to the prejudice of an accused person unless he had had an opportunity of being heard either personally or through an advocate in his own defence. Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

3. Where the sentence dealt with under this section has been passed by a Subordinate Court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

4. Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

5. When an appeal arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”

13. It is clear from the above provisions of the Criminal Procedure Code that the High Court has wide powers in its revision jurisdiction. However there are also some limiting factors to those powers.

14. First, the High Court in its revision jurisdiction cannot reverse or alter an order of acquittal. Secondly, it cannot make an order that is to the prejudice of the accused person unless he has had an opportunity of being heard either personally or by an advocate. Thirdly, when an appeal arises from such sentence finding or order of the magistrate's court, and no appeal is brought, revision proceedings cannot be sustained at the insistence of the party who could have appealed.

15. I also hold the view that in matters of revision, the court would invoke the inherent powers donated to it under the Constitution for purposes of doing substantive justice. Under **Article 165(3)(a)** the High Court is conferred unlimited original jurisdiction in a criminal matter. This should be read together with Sub-Article (7) which provides that, in making any order, the court should ensure the fair administration of justice. Furthermore, under Article 159 (2)(d) the court should administer justice without undue regard to procedural technicalities. That is to say that, the overall objective in granting any order, is to do justice.

16. The issue herein is whether the circumstances of the matter does justify a revision by a superior court from subordinate court. On this issue I draw guidance as elucidated in the case in the case of **Republic –vs- James Kiarie Mutungei [2017] eKLR** Nyakundi J held thus:

“The rationale of the High Court as a revisionary authority can be initiated by an aggrieved party, or suo moto made by the court itself, call for the record relating to the order passed or proceedings in order to satisfy itself as to the legality, or propriety, correctness of the order in question. The scope of revision therefore is more restrictive in comparison with the appellate jurisdiction which requires the high court to rehear the case and evaluate the evidence in totality by the lower court to come with a decision on the merits...”

17. It is therefore my view that in the present application the circumstances principally fit the requirements of Section 362 of the Criminal Procedure Code and as such this court has jurisdiction under the present circumstances.

18. On the second issue, and whether the trial Court was justified in arriving at the decision to release the 297 bags of cement to the 3rd Respondent. The Applicant through the Learned Counsel submits that while the 3rd Respondent was out on bond and investigation ongoing the court ordered the release of the 297 bags of cement to the 3rd and 4th Respondents while the same had not been produced as exhibit in court to prove the case against the 3rd Respondent and another suspect who is still at large. The 1st and 2nd Respondents also seem to support the submissions by the Applicant and seeks to have the orders by the Learned Magistrate revised. Both the Applicant and 3rd Respondent seek to have ownership of the 297 bags of cement. On this I am guided by the provisions of Section 121(1) of the CPC on the detention of property. This is a case where two parties are disputing on goods and ownership it would therefore be unjust to release the exhibits to one party without the court determining the ownership by either of the parties in a trial.

19. The balance of justice demands that thorough investigations be done and having taken all the facts and the circumstances of this case, I believe it would be in the best interest of Justice that the earlier orders by the Learned Magistrate Honorable D. Odhiambo, Resident Magistrate, Shanzu be revised in the following terms:-

a) The 297 bags of cement to remain in custody of Bamburi police station.

b) In consideration that the cement is at risk of being wasted due to vagaries of weather the Investigating Officer in conjunction with the applicants and the respondents to dispose the same at the best possible price within 14 days of the date of this ruling and handover the proceeds for safe custody to the OCS Bamburi police station to be kept as exhibit pending conclusion of investigations and determination of ownership of the subject cement.

c) Mention on 17th December 2020 at Shanzu SPM's Court to confirm if the Investigating Officer has completed Investigations and for appropriate orders in regard to the proceeds of sale.

Dated, signed and delivered at Mombasa this 19th day of November, 2020.

HON. LADY JUSTICE A. ONG'INJO

JUDGE