



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

MISCELLANEOUS APPLICATION NO. 32 OF 2016

FRANCISCA AKINYI.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. The applicant **Francisca Akinyi** seeks orders that the Court be pleased to review the Court orders made on 21st March, 2012 by the Principal Magistrate B. M. Achoi which ordered that the applicant deposit in Court an amount equivalent to the assessed value of the motor vehicle registration number KBP 328Y Toyota Probox which was assessed by the said magistrate to be Ksh.500,000/= . That the Court to issue an order releasing the said motor vehicle registration number KBP 328Y Toyota Probox to the applicant without the applicant depositing Ksh.500,000/= as ordered by the Court as the applicant is willing to abide by other conditions set by the Court.

2. The application is based on the following grounds:

(i) The Applicant is the bonafide owner of motor vehicle Registration number KBP 328Y Toyota Probox which motor vehicle was allegedly used in the transportation of cannabis sativa in Criminal Case Number 638 of 2011 – Wanguru.

(ii) The said motor vehicle was detained by Police officers for the last five (5) years from 2011 to date and is wasting at the Police Station whereas the prosecution is not making any attempt to apprehend the accused in Criminal Case No. 638 of 2011 – Wanguru.

(iii) A ruling was delivered on 21st March, 2012 by the Wanguru Court where it held that the said motor vehicle to be released to the Applicant upon certain terms/conditions.

(iv) The applicant has been unable to meet one of the conditions set by the Court being that the Applicant deposit Kenya Shillings Five Hundred Thousand (Ksh.500,00,000/=) in the Court being an equivalent amount of the assessed value of the motor vehicle.

(v) The applicant has complied with the other term or condition of the Court which is that the applicant deposit in court the original log book of the motor vehicle.

3. The applicant further supports the application with her affidavit sworn on 6th September, 2016. Her contention is that she is the bona fide owner of motor vehicle registration number KBP 328R (to be

referred to as the said motor vehicle) which was allegedly used in transportation of cannabis sativa which is the subject matter in Wanguru Criminal Case No. 638 of 2001. She claims that the motor vehicle was being used for car hire business and proceeds used to support her family. It is in the course of such business that the accused person in Criminal Case No. 638 of 2001 at Wanguru hired her motor vehicle which she later learnt was detained for allegedly being used to transport cannabis sativa.

4. The said accused pleaded not guilty and upon being released on bond absconded. Despite warrants of arrest being issued, he has not been arrested. In the meantime the vehicle continues to waste at the Police station. She applied for the release of the motor vehicle but the Court ordered that she deposits Ksh.500,000/= plus the log book. She did comply with the order to deposit the log book in Court but was unable to raise ksh.500,000/= and hence this application. The application is not opposed as the respondent though served did not file any response.

5. I have considered the application. The applicant annexed the ruling of the trial magistrate and the proceedings in Criminal Case No. 638 of 2011 before Principal Magistrate's Court Wanguru. It is clear from the ruling and the proceedings that the said motor vehicle was detained as an exhibit in the Criminal Case. The trial magistrate observed that the vehicle was involved in the commission of a serious offence which *inter alia* may attract a penalty of forfeiture of the vehicle. That it would be unsafe to release before evidence is adduced on how it was found in possession of the accused.

6. The accused in the criminal case faced charges under the Narcotic Drugs and Psychotropic Substances Control Act. From the averments by the applicant the vehicle was detained for allegedly transporting narcotic drugs. Section 20 of the Act provides:

“(1) Any machinery, equipment, implement, pipe utensil or other article used for the commission of any offence under this Act shall be forfeited to the government.

(2) Every conveyance used for the commission of any offence under this Act or for carrying any machinery, equipment, implement, pipe, utensil or other article used for the commission of any offence under this Act or any narcotic drug or psychotropic substance, shall be forfeited to the government.

Provided that on an application made by the person who was the owner of the conveyance to the Court in which the prosecution for any offence under this Act or before which any proceedings under this Act for the forfeiture and condemnation of any conveyance, not being a proceeding under Part IV is pending the Court is satisfied beyond any reasonable doubt that :-

(a) The person who was the owner of the conveyance, and

(b) In the case of an aircraft or ship, every person who was a responsible officer thereof when it was made use of for such conveyance was not concerned or privy to such use, the conveyance shall be restored to the owner by that Court.”

7. The applicant made the application before the trial Court which granted the application before the trial Court which granted the prayer but she is unable to fulfill some of the conditions for release. The Court under the above provision is mandated to release the vehicle or conveyance if the owner was not concerned or privy to such use. It is also true to say that the Court has discretion to release the motor vehicle to the owner. Under Section 177 of the Criminal Procedure Code, it is provided:-

“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.”

8. In this case there is no determination by the trial Court as to the true owner of the motor vehicle as the case has not been concluded. In this case, the vehicle is alleged to have carried the narcotic drugs the subject matter in the criminal case. The criminal case is still pending and the said motor vehicle has not been produced as an exhibit.

9. The applicant seeks review of the conditions put by the trial magistrate. Review is provided under **Section 362** and **364** of **Criminal Procedure Code**. **Section 362** provides:

“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.”

Section 364 (1) makes further directions on revision. It is provided:

“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 – in the case of any other order other than an order of acquittal, alter or reverse the order.”

10. The applicant is contending that she is the bona fide owner of the motor vehicle and though the Court ordered it be released to her she is unable to meet the conditions for its release. The Court has jurisdiction to review the order of the trial magistrate. I am aware that my brother judges in the High Court have given diverse orders as to whether the trial magistrates have jurisdiction to release properties not produced as exhibit and before positive determination by the trial Court as to the owners. These are in **Elijah Nyakebondo -V- Republic (2017) eKLR** where it was held:

“I find that the magisterial court was not entitled to direct that the subject motor vehicle be released to the respondent/accused. The reason for this is that the motor vehicle had not been produced as an exhibit in the magistrate’s court. It is only when some property including a motor vehicle have been produced as an exhibit in court that that court is then seized with the jurisdiction to order for its disposal.”

Also in **Republic -V- Everlyn Wamuyu Ngumo (2016) eKLR** where it was stated:

“I find that the trial court was not entitled to direct that the motor vehicle be released to the respondent/accused in order as that court put it “to save it from the wear and tear due to immobilization of the engine.” The reason for this is that the motor vehicle had not been produced as an exhibit in court. It is only when some property including a motor vehicle have been produced as an exhibit in court that that court is then seized with the jurisdiction to order for its disposal.”

My view is that each case must be taken on its own peculiar circumstances. Furthermore, under **Section 22 of the Narcotic Drugs Act, (Supra)** the provision is couched in mandatory terms. This application is not brought under **Part IV of the Narcotic Drugs and Psychotropic Substances (Control) Act**. The application is under the proviso to **Section 20** of the **Act**. The Court had jurisdiction to make the order. There is a school of thought by the High Court that the trial magistrate can order release of an exhibit before it is produced as an exhibit. In **David Muigai Mucheru -V- Kenya Forest Service & Another (2012)** it was stated:

“Clearly, therefore, there is no requirement in that section, that the court before which the person is charged must have received the property as an exhibit before the court can give orders in relation thereto. Provided that some property was taken from the accused when he was apprehended, (whether such recovery was made before, at the time of, or after the actual arrest),

the court before which he is charged can issue orders relating to the property.”

The applicant in this case was not an accused person before the trial magistrate. The above provision under the Narcotic Drugs Act (Supra) provides that the Court shall restore the conveyance to the owner. The trial Magistrate found it fit to release the vehicle to the applicant but put such conditions which were beyond the reach of the applicant. The vehicle has been detained for the last five years. My view is that since the intention of the trial magistrate was to release the vehicle to the applicant with conditions but she has been unable to meet such conditions, this Court has discretion to review the terms of release. The State did not oppose this application. I am of the view that since the criminal case is still pending, there should be conditions which will ensure that the vehicle will be availed in Court whenever required. I order that in addition to depositing the log book as ordered, the applicant will swear an affidavit giving her personal details and particulars including details of where the vehicle will be operating, and deposit it with the investigating officer. She will under not to part with possession until the case is heard and determined. The Police will be at liberty to take the photographs of the motor vehicle before it is released. The order to deposit ksh.500,000/- is reviewed and set aside.

Dated and delivered at Kerugoya this 25th day of January, 2018.

L. W. GITARI

JUDGE