



EPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL MISC. APPLICATION NO. 24 OF 2017

FRED MWAURA KIMANI.....APPLICANT

VERSUS

D.C.I.O. KITUI CENTRAL.....1ST RESPONDENT

THE O.C.S. KITUI POLICE STATION.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION....3RD RESPONDENT

RULING

1. By a Notice of Motion dated the 3rd April, 2017, the Applicant, **Fred Mwaura Kimani** seeks orders as follows:

(i) **That** the Motor Vehicle Registration Number KCD 339J detained at Kitui Police Station be released forthwith to the Applicant **Fred Mwaura Kimani**, by the OCS Kitui Police Station or by the officerer under the direction of the OCS Kitui Police Station.

(ii) **That** the Applicant to be ready to avail the Motor Vehicle any time that the Court may ask for it.

(iii) **That** the Director of Public Prosecutions Kitui County do serve the order on the OCS Kitui Police Station.

2. The application is premised on grounds that the Applicant purchased the subject motor-vehicle through the Asset Finance Loan from Equity Bank (k) Limited and it's jointly registered in his name and that of the Bank. The motor-vehicle has been in police custody since **April, 2016** awaiting investigations into an offence of **Conspiracy to Defeat Justice** contrary to **Section 117** of the **Penal Code**. That the loan has remained un-serviced since then such that the bank has threatened to repossess the motor-vehicle to exercise its right of re-sale to recover the unpaid amount plus interest thereon and that a similar application was made before the Chief Magistrate who declined to rule on it on the ground that it was overtaken by events as the High Court ordered a retrial in **Kitui Criminal Case No. 357 of 2016** in which the subject motor-vehicle is an exhibit. But, since photographs of the motor-vehicle have been taken they can be used during trial.

3. In an affidavit in support of the application, the Applicant deponed that **Kimani Kamau** hired his motor-vehicle to use within **Kitui West**. He failed to return it on the **9th April, 2016** therefore he carried out a search only to find that **Kimani Kamau** had been arrested and charged for the offence of **Transporting Charcoal without a Permit** in Kitui Chief Magistrate's Court where he was convicted and sentenced.

4. On learning that he was required to appear before Court to show cause why the subject motor-vehicle should not be forfeited to the State he appeared before **Hon. Rose Ombata** on **11th April, 2016** who warned him and issued an order for release of motor-vehicle.

5. That on the **13th April, 2016**, **No. 232022 C I Daniel Thuku** obtained orders to detain the subject motor-vehicle pending investigations into the offence of **Conspiracy to Defeat Justice** as provided by **Section 117** of the **Penal Code**. He moved the Court to have the motor-vehicle released which ruled that the application had been overtaken by events as a retrial had been ordered in **Kitui Criminal Case No. 357 of 2016** in which the motor-vehicle was an exhibit.

6. It was the Applicant's averment that he is suffering unfairly for an offence committed by **Kimani Kamau** and it is only proper for the subject motor-vehicle to be released to him pending a retrial. The continued detention of the motor-vehicle is harmful as it exposes him to irreparable loss and damages and grave financial loss.

7. In a supplementary affidavit the Applicant averred that suspects were charged with the offence of **Conspiracy to Defeat Justice** and he is a witness.

8. The ODPP, the Respondent herein was duly served with the application but he failed to respond. In spite of the reminder in open Court and even being granted leave to respond to the Supplementary Affidavit that was filed, they neglected to do so.
9. The Applicant chose to rely on the affidavit evidence filed while the Respondent purported to file written submissions.
10. In essence the application stands unopposed since the Respondent failed to file either an affidavit in reply or Grounds of Opposition.
11. I did pronounce myself in **Criminal Revision No. 4 of 2016** where the subject motor-vehicle was an exhibit. In **Paragraph 14** of the **Ruling** I stated thus:

“In the result, I quash the conviction and set aside the sentence imposed. Orders that emanated therefrom which are illegal are also quashed. I therefore remit the matter to be determined by the subordinate court presided over by a Magistrate of competent jurisdiction other than Honourable E. Boke, Principal Magistrate and Honourable R. Ombata, Resident Magistrate. Mention on the 13th September, 2016.”

Without any response from the Respondent there is no indication if the order dated the **8th** day of **September, 2016** was complied with.

12. It is stated that same suspects have since been charged with the offence of **Conspiracy to Defeat Justice** in **Criminal Case No. 280 of 2017** where the subject motor-vehicle should be adduced in evidence. In my Ruling I clearly pointed out at **Paragraph 9** that the subject motor-vehicle that the Resident Magistrate purported to release had not been produced in evidence and was not in custody of the Court.

13. If the Applicant is a witness in the case of **Conspiracy to Defeat Justice** as alleged in **Paragraph 3** of the Supplementary Affidavit, the application for release of the motor-vehicle should be made in that particular case once the exhibit is produced.

14. From the foregoing the application before me is unmeritorious. Accordingly, it is dismissed.

15. It is so ordered.

Dated, Signed and Delivered at Kitui this 17th day of April, 2018.

L. N. MUTENDE

JUDGE