



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCR. MISC. APPL NO. 44 OF 2018

JIMMY .H. KIMARO.....APPLICANT

-VERSUS-

ANTHONY KIIRU MAINA.....1ST RESPONDENT

MICHAEL MUTISYA KYENZE.....2ND RESPONDENT

ANTHONY WEKESA SITUMA.....3RD RESPONDENT

BERNARD KIMOTHO MAKAU.....4TH RESPONDENT

DAVID KITANY.....5TH RESPONDENT

JOSEPH THEURI WAIHWA.....6TH RESPONDENT

RULING

INTRODUCTION

1. The Applicant filed a Notice of Motion Application dated 27/07/2018 praying for orders;

a) **That** this Honorable Court be pleased to vacate orders issued on 04/07/2018 by the Senior Principal Magistrate Court, Makindu, to enable Mr. Jimmy. H. Kimaro (ASP), an investigator with Directorate of Criminal Investigations attached to Directorate of Criminal Investigation Makindu, to process the case for hearing after arraigning six accused persons in Court on matters of Robbery with violence and stealing goods in transit.

b) **That** this Honorable Court issues any order that will assist the investigating officer in retaining the exhibit recovered until the hearing and final determination of the case, in conformity with section 121 of the Criminal Procedure Code.

2. The Application is brought under Articles 244, 245(4) (a)(b) of the Constitution of Kenya 2010, Sections 24,35 of the National Police Service Act, Sections 26(1)(b) &121 of the Criminal Procedure Code, Sections 311 (1) of the Penal Code.

3. There are grounds on the face of the Application as well as supporting affidavit sworn by the Applicant.

4. The Application was opposed by the 6th Respondent through his replying affidavit dated 27/07/2018.

5. A brief background of the case is that the Respondents are accused persons in Makindu Senior Principal Magistrate's Court Criminal Case No. 889 of 2017 where they have been charged with Robbery with violence and stealing goods in transit.

6. Motor vehicle registration number KBP 480B make, Scania Prime mover and trailer registration number ZE 9043 were seized and detained at Makindu police station on allegations of having been utilized in the commission of the aforesaid offences.

7. In the course of proceedings before the trial Court, the sixth Respondent applied to have the prime mover and trailer released to him. In his affidavit in support of the Application, he averred that he was the owner and exhibited documentary proof. The Application was not opposed. It was therefore allowed with some conditions.

8. The orders issued by the learned trial magistrate on 04/07/2018 are worded as follows:-

- a) **That** motor vehicle prime mover Scania registration number KBP 480B and Tanker Trailer No. ZE 9043 being held at Makindu police station be released to Joseph Theuri Waihwa, the owner within 7 days from today.
- b) **That** the owner to maintain the vehicle Prime Mover and Trailer in good condition and ensure that the vehicle is insured at all times.
- c) **That** the motor vehicles be photographed by officers from scenes of crime before being released to the owner.
- d) **That** the owner to avail the vehicle Prime Mover and Trailer before this Court when ordered to do so by this Court.

9. The Application came up for hearing on 30/07/2018.

10. The Applicant appeared in person, learned Counsel Mr. Hassan held brief for Mr. Kibanga for the complainant and learned Counsel Mr. Kasyoka appeared for the sixth Respondent.

11. The Applicant submitted that the case was yet to be heard by the trial Court and the exhibit had not been produced. He said that section 121 of the Criminal Procedure Code (CPC) was applicable.

12. He went on to submit that, in releasing the exhibit, the trial Court neither consulted nor involved the investigating officer. According to him, release of the motor vehicle would not safeguard public interest as the case would be prejudiced.

13. On his part, Mr. Hassan relied on a letter dated 25/07/2018 which had been written by the complainant's Counsel. It gave various reasons as to why revision of the orders should be allowed. The reasons were *inter alia*, that the vehicle was alleged to have been used by the accused persons in the commission of the offence hence liable to forfeiture under section 311 of the Penal Code.

14. Further, it was stated that the vehicle had not been formally produced as evidence and was therefore not in the custody of the Court at the time of making the order.

15. In opposing the Application, Mr. Kasyoka submitted that the Office of the Director of Public Prosecutions (ODPP) had indicated unwillingness to participate in the matter before this Court. That in the trial Court, the ODPP conceded a similar Application which had been filed by the Applicant.

16. According to Mr. Kasyoka, the Applicant is the investigating officer and has no locus to bring the Application as it is tantamount to usurping the mandate of the ODPP. That if the Applicant was unhappy with the ODPP, he was supposed to take administrative action.

17. Further, he submitted that the Directorate of Criminal Investigation (DCI) is under the Inspector General (IG) of the National Police Service and its role is to collect information and investigate. That it has no role to prosecute.

18. It was his further submission that the IG acts under the directions of the ODPP and that the latter does not act under the control of anybody. He went on to say that there was nothing wrong with the concession by the ODPP.

19. Further, he submitted that the 6th Respondent was ready to avail the motor vehicle whenever required. According to him, there was no law requiring detention of a motor vehicle in instances where forfeiture had been stipulated.

20. He contended that there was no demonstration of how the trial magistrate had made a mistake or breached the law. That it was a matter of discretion and cannot be faulted. He urged the Court to dismiss the Application.

21. In rejoinder, the Applicant said that the driver is still at large and the owner is yet to hand over his (*driver's*) details. Mr. Hassan said that if the vehicle is released, it should be fitted with a tracking system.

22. At this point, Mr. Kasyoka interjected and said that the vehicle has already been fitted with a tracking system.

23. I have looked at the Application, the affidavit in support and annexures thereto, the letter from the complainant, the proceedings from the trial Court and the rival submissions. It is my considered view that the following issues arise for determination;

- a) **Whether the Applicant has the requisite locus to bring the Application.**
- b) **Whether the orders issued by the learned trial magistrate on 04/07/2018 should be revised.**

LOCUS

24. The revisionary jurisdiction of the High Court is derived from section 362 of the Criminal Procedure Code (CPC) which provides 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.”

25. This jurisdiction is further recognized by article 165 (6) & (7) of the Constitution of Kenya 2010.

26. It is really not in dispute that ordinarily, an investigating officer should take directions from the ODPP however, with this particular Application, I will resort to section 364 (1)(b) of the CPC which provides as follows;

“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; (emphasis mine)

a)

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

c)

27. My interpretation of the above section is that there are unlimited ways in which the High Court may become aware of proceedings in a subordinate Court requiring it's attention.

28. In this particular case, it is on record that the ODPP was unwilling to participate in the hearing of the Application before this Court.

29. Perhaps the unwillingness of the prosecution Counsel was informed by the fact that her colleague did not oppose the release of the motor vehicle before the trial Court.

30. The ideal situation is that the investigating agencies and prosecuting personnel should work as a team however; the Courts have become increasingly aware of instances where these two important players in the criminal justice system cannot stand each other.

31. It is akin to the proverbial fight between two bulls where the innocent grass bears the brunt. My sentiments should not in any way be construed to mean that it is the prevailing situation in the current case however, that possibility cannot also be ruled out.

32. Now that this Court is already aware of the proceedings before the trial Court, should it down it's tools on the ground that it's awareness has been brought about by a party who should ordinarily be working under the directions of the ODPP?

33. I think not. The interests of justice demand that the Application be heard on merits. Furthermore, I am of the view that his capacity to bring the Application is properly hinged on section 364(1)(b) of the CPC.

34. It is also common ground that the subject exhibit has not been produced as evidence and as the investigating officer; the Applicant is the chief custodian of the exhibit.

35. It is therefore well within his mandate to take any necessary measure that ensures the preservation of the exhibit.

Whether the orders should be revised

36. From a reading of section 362 of the CPC (*supra*), this Court should concern itself with the propriety, correctness or legality of the orders sought to be revised.

37. Section 177 of the CPC mandates Courts to restore property which has been taken from accused persons. It is worded a follows;

“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.”

38. Part (b) is a clear indication that restoration of seized property is not automatic. There are laws which expressly provide for forfeiture upon conviction of an accused person. For example; **section 215 (1)** of the **East African Community Customs Management Act** provides that;

“Where any person is prosecuted for an offence under this Act and anything is liable to forfeiture by reason of the commission of the offence, then the conviction of the person of the offence shall, without further order, have effect as the condemnation of the thing.”

39. Further, section 20 of the Narcotic Drugs and Psychotropic Substances Control Act provides that;

“(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.”

40. In the case of HC at EMBU CRI REV NO. 138 OF 2016 R –VS- EVERLYNE WAMUYU NGUMO on similar facts, the court held;

“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.”

41. The circumstances of the above case arose also in Republic –Vs- Mombasa Development Limited and 4 others, being High Court at Nairobi, Criminal Revision No.112 of 1988.

42. It is now trite that in considering whether to release an exhibit, a trial Court should satisfy itself that;

- a) The person seeking its release has proved that he/she is the owner.**
- b) The person seeking its release has proved that he/she was not involved in the offences before Court.**
- c) That the exhibit is not liable to forfeiture.**

43. The provisions of section 311. (1) of the Penal Code provide that;

“Where any person is convicted of an offence, or of an attempt to commit an offence or of counselling or procuring the commission of an offence, under the provisions of this Chapter, or of Chapter XXVI or Chapter XXVIII or section 322, and the court by which the person is convicted finds that any aircraft, vessel or vehicle was used or employed by that person in the commission or to facilitate the commission of the offence of which he is convicted, the aircraft, vessel or vehicle may be forfeited.”

44. The Respondents herein are accused persons in Makindu Senior Principal Magistrate’s Court Criminal Case No. 889 of 2017 where they have been charged with Robbery with violence and stealing goods in transit. All the offences charged lie within the purview of the above provisions.

45. In the instant case, it is no longer in dispute that the 6th Respondent is the owner of the motor vehicle however, since he is an accused person, it is not possible for him to prove that he was not involved in the crimes by dint of the instant Application. That is an issue for determination by the Court after due process.

46. Having opined that the 6th Respondent does not satisfy the 2nd and 3rd requirements above, I hold that the revision has merit.

CONCLUSION

47. Thus the court makes the following orders;

- i. The motor vehicle subject herein shall not be released.**
- ii. The instant matter shall be heard on a day to day basis on dates to be agreed so that it can be expedited.**
- iii. Further, Makindu Cri case No. 889 of 2017 is hereby transferred to Makueni SPM Court for hearing and determination.**

SIGNED, DATED AND DELIVERED THIS 8TH DAY OF AUGUST 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE