REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL REVISION NO. 8 OF 2017

DIRECTOR OF PUBLIC PROSECUTIONS……...……....APPLICANT

Versus

MARIAS PAKINE TENKEWA T/A

NARESHO BAR RESTAURANT …….…….....RESPONDENT

RULING

Before me is an application dated 14/7/2017 brought by the Director of Public Prosecutions against the respondent pursuant to Article 165 (3) 6, 7, Article 20, 21, 23, 48, 54 of the Constitution, as read with section 362, 364, 121, 177 and 389A of the Criminal Procedure Code (Cap 75 of the Laws of Kenya).

The applicant further invoked section 3, 4, 5, 7, 8, 9 and 10 of the Fair Administration Act 2015. The applicant seeks the following orders:-

1. That the honourable court be pleased to grant a stay of the orders and ruling by the honourable court granted on the 7th July, 2017 in the Kajiado Miscellaneous Criminal Application No. 99 of 2017 pending the hearing and determination of this Revision Application.

2. That the honourable court be pleased to grant an interim stay stopping hearing in the following cases pending before the Kajiado Chief Magistrates Court being: Criminal Case No. 658 of 2017, Criminal Case No. 659 of 2017, Criminal Case No. 660 of 2017, Criminal Case No. 697 of 2017 and Criminal Case No. 698 of 2017 pending the hearing and determination of this Revision Application.

3. That the honourable court be pleased to revise, vary and/or set aside the entire proceedings, ruling and orders of the Hon. M. Chesang RM dated 7th July, 2017.

4. That the honourable court be pleased to dismiss the notice of motion application dated 6th July, 2017 filed in the Kajiado Chief Magistrate's Court on the 7th July, 2017.

5. That the honourable court be pleased to order that the following cases pending before the Kajiado Chief Magistrate's Court being: Criminal Case No. 658 of 2017, Criminal Case No. 659 of 2017, Criminal Case No. 660 of 2017, Criminal Case No. 697 of 2017 and Criminal Case No. 698 of 2017 be heard by a different court other than the one presided over by Hon. M. Chesang RM.

The grounds taken in the writ of petition in this court for review under the said provisions of the constitution and statute are:

1. That the Miscellaneous notice of motion application dated 6/7/2017 filed in the Chief Magistrate's Court in Criminal Case No. 99 of 2017 where the respondent was a party was totally and incurably defective which ought to be struck out by this court.

2. That the Misc. Application was not premised on any prescribed provisions of the law.

3. That the respondents were never served and no notice of the said application as such, hence unlawfully denying them a right to a fair hearing.

4. That the applicant was a stranger in the said application and any conduct on his behalf were unlawful and unjust.

5. That the learned trial magistrate exceeded her mandate and acted ultravires by unlawfully releasing exhibits that were never ascertained by the court to be existing and which had not been produced before court as required by law.

6. That the extracted order and the order in the court file are at variance thus unlawful.

7. That the entire proceedings of the 7th July 2017 does not inspire confidence in the judicial process which is nullity and against natural justice and rule of law and procedure.

8. The accused person in the criminal cases were denied a chance to air their views with regards to exhibits that touch on their cases as such a violation of their rights to a fair hearing.

BRIEF FACTS:

The police in Kitengela police station were on patrol on or about 30.5.2017, and 7/6/2017 along and around Oloosirkon Trading Center within Kajiado County. During the routine patrol they came into contact with the accused persons indicted in Cr. Case No. 99 of 2017, 658 of 2017, 659 of 2017, 660 of 2017, 697 of 2017 and 698 of 2017 operating their bar premises without the requisite licences. Consequently they arrested the accused persons together with several exhibits consisting of alcohol drinks of various brands and assortment. The accused persons upon completion of investigations were charged under section 7 (1) (b) as read with section 62 of the Alcoholic Drinks Control Act No. 4 of 2010. The offence in question was that of operating a wines and spirit wholesale shop without a licence. The accused persons pleaded not guilty to the charges and were released on a bond/cash bail of Ksh.7,000 while others were released on cash bail of Ksh.5,000 in order to attend a scheduled hearing set on 1/9/2017.

Before the hearing of their cases on the 1/9/2017 the respondent Marias Pakine Tenkewa filed a miscellaneous application in Cr. Case No. 99 of 2017 seeking the release of all the exhibits seized on the 30/5/2017 and 7/6/2017. In that application the learned trial magistrate ordered as follows:

- **Application to release the exhibits allowed. The goods to be photographed within 7 days from the date hereof and thereafter released to the applicant.**

The respondent was represented by Ms. Mbaka learned counsel who entirely relied on the replying affidavit dated 12/10/2017. The following issues were raised in the affidavit:

1. According to the respondent the learned trial magistrate properly exercised her discretion in hearing the application for release of the exhibits pending the hearing of the case contrary to the arguments by the applicant's counsel.

2. The respondent further deposed that the police arrested the accused who were not selling any drinks to alleged customers.

3. The respondent further averred that the applicant has not shown sufficient reasons why the order

of the trial magistrate should be reviewed and set aside.

4. On the question of the exhibits the respondent deposed that the said application was made in the context of an owner of the exhibits which in the circumstances to safeguard the proprietary rights.

5. Finally the respondents emphasized that this application by the applicant is brought as an afterthought upon realizing that they are in contempt of court. As the trial court explained the respondent deposed that the exhibits were to be released on condition that they be photographed. The respondent requests that this application be dismissed.

ANALYSIS AND DETERMINATION:

I have considered the application, the replying affidavit and both counsels skeleton oral submissions. The principal question is whether the learned trial magistrate was right to grant the order for the release of the exhibits to the owner before conclusion of the case against the accused persons.

Jurisdiction:

Let me start by reciting the applicable law.

The high court is vested with supervisory jurisdiction under Article 165 (6) and (7) of the Constitution. The constitution has laid down broadly the powers of the high court as outlined herein under thus:

> **"165 (6): The high court has supervisory jurisdiction over the subordinate courts and over any person, or authority exercising a judicial or quasi judicial function, but not over a superior court.**
>
> **(7) For purposes of Clause (6) the high court may call for the record of any proceedings before any court or person, body or authority, referred to on Clause (6) and may have any order or give any direction it consider appropriate to ensure the fair administration of justice."**

The power of the high court under Article 165 (6) and (7) is both administrative as well as judicial. It is so wide such that can be exercised by virtue of an application by an aggrieved party or any other authority or may even be invoked *suo moto*. This jurisdiction is also provided for under the High Court Administration and Organization Act in section 10. The supervisory jurisdiction should not be confused with Article 165 (e) which deals with the power to hear appeals from a decision of subordinate courts or tribunals. The supervisory jurisdiction as deduced from Article 165 (6) and (7) is to be used sparingly in a appropriate cases to ensure a fair administration of justice.

In this regard I see the following elements to be within the scope of Article 165 (6) and (7). The power invests in the high court both concurrent appellate and revisional jurisdiction over the subordinate courts and tribunals. Admittedly the high court may under the constitutional provisions Article 165 (6) and (7) as read with section 362 and 364 of the Code treat the application for revision as a petition of appeal that will be necessary for interest of justice. It is not possible to lay down any restrictive procedure which would govern the exercise of supervisory jurisdiction conferred by the constitution covered under Article 165 (6) and (7).

Limits of authority on revision:

It is not a function purely vested to correct errors, mistakes and omissions of a subordinate court or tribunal. Secondly, where the subordinate court or tribunal has acted *ultravires* of jurisdiction. Thirdly, where the subordinate court, person, authority, tribunal has exercised jurisdiction in a manner which has occasioned grave injustice or failure of justice.

The scope of this application under Article 165 (6) and (7) has been brought in the context of section 362

as read together with section 364 of the Criminal Procedure Code (Cap 75 of the Laws of Kenya). The provisions deducible from section 362 and 364 state 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 such findings, sentence, order recorded or passed as to the regularity of any proceedings of any such subordinate court."**

In exercise of revisionary jurisdiction the broad guidelines are set out under section 364 of the CPC. The court at the end of it all is to invoke this jurisdiction to ensure and use it to meet the ends of justice even within the interlocutory stage of any proceedings. The essence of all these provisions under the constitution and criminal procedure code is to secure that the jurisdiction of authority of inferior courts/tribunals should be properly exercised.

What has been made clear under section 364 is the limitation of the court not authorized to convert a finding of acquittal into one, that of conviction. It is therefore right to hold that the power of revision is confined in order to correct a miscarriage of justice which has a risen in the inferior courts in cases like:

> (1) Misconception of the law.
>
> (2) Irregularity of procedure.
>
> (3) Neglect of procedural precautions and safeguards, apparent error/mistake on the face of the record.

These principles will mirror throughout the analysis and determination of the application beforehand in addition to the elements stated above in paragraph 1 on limits of jurisdiction. A court cannot confer jurisdiction where none existed and cannot make a void proceedings valid. What is important in this case, and which begs for an answer, is whether the magistrate was bound to release the exhibits to the defendant/complainant before being admitted by the court? The second question for consideration is whether the applicant is entitled to the orders sought under Article 165 (6) and (7) as read with section 362 of the CPC?

The bone of contention in this application is the manner in which the trial magistrate released the exhibits:

In law exhibits are anything other than testimony that can be perceived by the senses and presented at the trial. Exhibits can therefore include but not limited to tangible objects such as weapons, objects, clothes, tools, anything capable of being stolen chairs, tables.

Black's Law Dictionary 5th Edition [1978] 498 defines evidence as:

> **"Any specials of proof or probative mater, legally presented at the trial of an issue by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects etc.**
>
> **For purposes of inducing belief in the minds of the court or jury as to their contention. All the means by which any alleged matter of fact, the truth of which is submitted for investigations is established or disproved.**
>
> **Any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion of the existence or non-existence of some matter of fact. That which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other. That which tends to produce conviction in the mind as to existence of a fact. The means sanctioned by law of ascertaining in a judicial proceeding, the truth respecting a question of fact."**

Demonstrative evidence:

Evidence that represents or illustrates the real things such as photos, videos, diagrams, maps, charts.

Records: government records i.e. police records, payment records, writings in the form of letters, receipts, promissory notes.

It is a rule of thumb that before an exhibit can be offered into evidence in court a foundation must be laid for its admission. The first foundation that must be laid is that the article is authentic. If tangible items such as the ones before the trial court are to be admitted the proponent or the officer who seized them must introduce them before the court. That is what can be said to be the best evidence. That is the basis upon which most foundations for exhibits introduced and admitted in court are laid by live witnesses' testimony under the Evidence Act (Cap 80 of the Laws of Kenya) and the Criminal Procedure Code (Cap 75).

The standard procedure of introducing exhibits takes the following sequences:

Step 1: The prosecution counsel has to have the exhibits marked in the form of numbers or letters i.e 1, 2, 3, or A, B, C.

Step 2: The exhibits is then shown to the accused and the defence counsel.

Step 3: The prosecutor, then approaches the witness for identification.

Step 4: Lays the foundation for the exhibits in the particular hearing and relevance.

Step 5: The prosecutor moves the court for admission of the exhibit in evidence.

Step 6: The exhibit is then given a unique number or letter to formalize its introduction in the case against the accused.

The case before the trial court depended on the physical evidence. Generally, tangible/or documentary evidence need to be presented by the witness who has the knowledge of its existence i.e. the seizure, recovery, or the one who prepared the inventory report. That is how it must be identified by a label or mark as sufficiently reserved in the witness statement supplied to the accused and the defence counsel. There is no dispute that the preservation and safety of exhibits in any trial is an integral part of securing justice and fair play. To this end from the time of seizure to the moment the exhibit is required to be presented in court there is an obligation to all parties to the case to prevent an abuse of the process. One such way would be to avoid an interference with the exhibits in a manner which may occasion prejudice or mistrial of the case.

This is grounded on the basic principle of best evidence for the prosecution counsel to prove that the exhibit before the court is the same exhibit that was referred to by the witness in his or her statement. In establishing this chain of evidence each witness in a criminal trial handling an exhibit must write a brief statement identifying the exhibit, its whereabouts, station, when and how they received it and who they seized from and what is the relevance of it against the charge before court. It is neither feasible nor practicable to appreciate that from the record of the trial court where the allegations in the charge sheet constitute existence of some exhibits it's only fair and just that the evidence collected be made available to the accused before any order of their release is made. This will be conformity with constitutional provisions on the right to discovery.

The duty to disclosure in criminal cases in Kenya is based in our Constitution 2010 under Article 50 (2) (j), ***"the accused has a right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."*** case law and statutory principles.

In a commentary in his book Essentials of Criminal Procedure Code in Kenya the learned ***Author Kiage***

JA at ***para 6 at pg 165*** states as follows:

> ***"The right to pretrial discovery is now well established and the giving of the charge sheet, witness statements, investigations diaries, experts reports, copies of statements and exhibits is basic to every trial nowadays."***

This constitutional dictate is not discretionary on either the prosecutor or the court to decide whether it is in the interest of justice for an accused person to be provided with sufficient details of the charge and evidence in advance. The matter the trial court may need to consider are set out by the court in the case of ***Juma & Others v A.G [2003] 2EA 461*** where the court stated:

> ***"We hold that the state is obliged to provide an accused person with copies of witness statements and relevant documents. This is included in the package of giving and affording adequate facilities to a person charged with a criminal offence. In this connection it is for the prosecution to establish special circumstances upon which any limitation to the right of access may be based. The state must adduce evidence in individual cases to establish precisely what documents or statements or premises to be protected and the basis for such limitation.***
>
> ***In other words the onus of establishing the justification for a violation of any such fundamental rights guaranteed by the protection of the law, provisions of the constitution must be on the party alleging such justification to derogate from the constitutional guarantee."***

In summary the case before the trial court was pending pretrial discovery and disclosure which was on-going. When deciding whether or not to release the exhibits (read evidence) the prosecution and the trial magistrate ought to consider similar principles elucidated in this authority - ***Juma v A.G (Supra).***

In general the prosecution owed the parties to a trial a duty of care to explain why the exhibits were to be released before admitted in evidence. From the record the prosecutor never objected to the application filled by the applicant. It appears that there was some sort of conspiracy to render or obstruct or frustrate the realization of the right to a fair trial and due process in the case. The order by the trial magistrate in releasing the exhibits to the alleged owner without giving the accused reasonable access before the trial commenced was unnecessary.

The circumstances of this case are that the police seized assorted alcoholic drinks at Naresho Bar Restaurant on 30/5/2017 7/6/2017. The accused persons were charged with two (2) counts as follows:

Count 1: Operating a wines and spirit wholesale without a licence contrary to section 1 (1) (b) as read with section 62 of the Alcoholic Drinks Control Act No. 4 of 2010.

Count 2: Failing to display alcoholic drink licence contrary to section 20(1) as read with section 62 of the Alcoholic Drinks Control Act No. 4 of 2010.

The exhibits subject matter of the impugned order were to be used in the intended prosecution against the accused persons. In the instant case the assorted alcoholic beverages were ordered to be released to an interested party whose interest would be to ensure a fair trial does not take place against the accused person. It is equally important to note that the accused person in Cr. Case No. 99 of 2017 is an employee of the applicant. In this case the court had before it what one will describe as a primary evidence in the form of the seized drinks from the bar. Why temper with this evidence by releasing it and have the case prosecuted by way of production of photographs. I say so because in practical terms the learned trial magistrate had the opportunity of admitting the evidence to enable the accused to have reasonable access at that stage of the proceedings. Once that bit of evidence is sorted out would then on application for release be canvassed for consideration. The release was premature in absence of them not being marked, identified and admitted in evidence.

From the record both the prosecutor and the trial magistrate never invited the accused to offer any evidence or challenge the application. It was incumbent upon the learned trial magistrate to demonstrate

that in the circumstances of the case the accused rights to equality and freedom from discrimination under Article 27 (1) are not infringed or threatened to be violated. The court is the ultimate defender of the rights of an accused person. The cardinal precept is that the right to a fair trial under Article 50 of the Constitution is available to the court to balance the scales of justice. The interest of the accused persons ought to have been considered before any further orders are granted in respect of the exhibits.

As provided for under Article 10 of the Constitution in decision making, the process by the trial magistrate, the set principles of governance and national values on the rule of law, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, good governance, integrity, transparency and accountability are binding on her at all times.

The question raised by the applicant in respect to an infringement of the principle to equality and non-discrimination under Article 10 is therefore relevant in so far as handling the proceedings of 7/7/2017 are concerned. The implementation of Article 10 by the state officer in the decision making is considered the corner stone of good governance and fair administration of justice.

In view of the above constitutional provisions, principles and values, I am satisfied that the applicant has made out a case against the impugned order.

The second aspect of this case involves the jurisdiction of the trial magistrate in granting the order. In a classic case of Owners of the ***Motor Vessel v Caltex Oil Kenya Limited [2008] 1 EA 367*** the court held:

> ***"The question of jurisdiction is a threshold I issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.***
>
> ***By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means if no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind of nature of the actions and matters of which a particular court has cognizance or as to the area over which the jurisdiction shall extend or it may partake both of these characteristics."***

In applying the above principles to the instant case the following facts emerge as undisputed. The respondent to this application is a dealer in alcoholic drinks and beverages trading as Naresho Bar and Restaurant. As a result of a strong operation the police pursuant to section 51 of the Alcoholic Drinks Control Act on diverse dates namely 30/5/2017 and 7/6/2017 seized an assort of drinks necessary for the enforcement of the Act. It transpired that the seized drinks became a subject of evidence to be produced in an information of an offence filled against the accused contrary to section 7 (1) and 20 (1) of the Act. There is no dispute that the police entered the premises, took possession of the exhibits and prepared an inventory to that effect as admitted by the respondent in his affidavit. The record reveals that neither the pretrial discovery or the main trial had commenced. The lower court besides taking plea had not set down the case for hearing. At the time of plea the accused person denied the charge.

The essential question of law and fact became an issue for determination. The element of the offence beyond reasonable doubt was therefore relevant. The accused even disputed the facts sought to be asserted in the application for release of the exhibits. The applicant was on trial in Criminal Case No. 99 of 2017. He will at most called as a witness either for the prosecution or the defence.

The real point of this revision turns on the order of restoration made by the trial magistrate to release the exhibits. The question of seizure and order for restoration is catered for in section 60 and 61 of the Alcoholic Drinks and Control Act which provides as follows:

Section 60 (4):

> ***"Any person from whom an alcoholic drink or thing was seized may, within thirty days after the date of seizure, apply to the high court for an order of restoration, and shall send notice containing the prescribed information to the minister within the prescribed time and in the prescribed manner."***

Section 61 (1):

> ***"The high court may order that the alcoholic drink or thin be restored immediately to the applicant if, on hearing the application the court is satisfied that:***
>
> ***(a) The applicant is entitled to possession of the alcoholic drink or thing seized; and***
>
> ***(b) The alcoholic drink or thing seized is not and will not be required as evidence in any proceedings in respect of an offence under this Act.***
>
> ***(2) Where upon hearing an application made under section (1) the court is satisfied that the applicant is entitled to possession of the alcoholic drink or thing seized, but it is not satisfied with respect to the matters received in subsection (1).***
>
> ***(b) The court may order that alcoholic drink or thing seized be restored to the applicant on the expiration of one hundred and eighty days from the date of seizure if no proceedings in respect of an offence under this Act have been commenced before that time."***

The inference to be drawn from the prosecution under section 60 and 61 of the Act is that the learned trial magistrate lacked the jurisdiction to entertain the notice of motion dated 6/7/2017 to release the seized exhibits (read drinks and things). The operation of the principle of estopple on the question of jurisdiction hang on the need of the magistrate which apparently she seems to have resisted. The case was tried and decided upon the theory that the magistrate had the jurisdiction against the express provisions of law in section 60 and 61 of the Act.

The legal principle in ***Lillian Vessel Case (Supra)*** is crystal clear that jurisdiction exists as a matter of law and may not be conferred by counsel or the parties. It is trite that courts are creatures of the constitution and statute with their jurisdiction stated and clearly prescribed. That jurisdiction should therefore be exercised within the confines of the law.

In the present case the learned trial magistrate in granting the orders dated 7/7/2017 assumed jurisdiction in contravention of section 60 (4) and 61 (1) of the Act once a court lacks jurisdiction, the only option is to down the tools, anything, done, or made or decided without fulfillment of this condition precedent is a nullity and void *abintio*.

The orders herein shall abide Cr. Case No. 658, 659, 660, 697, 698 of 2017. The trial court is hereby directed to proceed with the trial against the accused persons expeditiously. The same be finalized within 40 days from today's date.

Dated, delivered and signed in open court at Kajiado on 22/11/2017

……

R. NYAKUNDI

JUDGE

<u>In the presence of:</u>

Mrs Mbaka for the applicant

Mr. Akula for Director of Public Prosecutions

Mr. Mateli Court Clerk