



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL REVISION NO. 138 OF 2016

REPUBLIC.....APPLICANT/PROSECUTOR

VERSUS

EVERLYNE WAMUYU NGUMO.....RESPONDENT/ACCUSED

RULING IN REVISION

1. The Director of Public Prosecutions (hereinafter referred to as DPP) filed this application for revision pursuant to sections 362 and 364 of the Criminal Procedure Code (Cap 75) Laws of Kenya, under certificate of urgency dated 12th May 2016. The application is based on six grounds. The first ground is that the trial court did not take into consideration the fact that the motor vehicle registration number KCD 112C was an exhibit the prosecution intended to use in Embu Chief Magistrate's Court Criminal Case No. 1393 of 2015. The third ground is that the said motor vehicle may be tampered with by the respondent if it is released to her. The fourth ground is that the trial court did not give a proper explanation as to why it ordered the release of the said motor vehicle to the respondent when it knew that the same was to be used as an exhibit by the prosecution in its proof against the respondent. I find that it is not necessary to set out the other grounds, since they are not relevant to this revision. It is upon these grounds that the DPP has applied to have the magisterial order of 6th May 2016 set aside and in its place order that the said motor vehicle be placed in police custody pending the hearing and determination of this trial.

2. Mr Ombachi for the respondent has opposed the application mainly on the grounds that the order sought to be revised is legally sound and that the DPP ought to have appealed against the order sought to be revised

3. The order that is sought to be revised was in the following terms:

1. THAT the OCS Itabua Police Station do release motor vehicle reg No. KCD 112C to the accused herein EVERLYN WAMUYU NGUMO.

2. THAT the accused do have physical possession of m/v Reg No. KCD 112C to save it from the wear and tear due to immobilization of the engine.

3. THAT any transfer of the m/v or sale of any parts thereof is prohibited until this case is heard and determined or until such further orders.

4. The DPP through Ms Mwanza submitted that the state intends to use the said motor vehicle as an exhibit during the trial of the case in that magisterial trial court. Additionally she has submitted that the said motor vehicle may be tampered with, by the respondent if it is released to her. She therefore prays that the said motor vehicle should be impounded at the County Criminal Investigation Office in Embu

until the the hearing and final determination of the above mentioned criminal case.

5. Ms Mwanza further submitted that the respondent is charged with a number of offences including conspiracy to defraud, obtaining money by false pretences, making documents without authority and altering the same documents. She also submitted that the subject motor vehicle is required as an exhibit in the ongoing trial in that court. It was also her submission that the money allegedly obtained by false pretences was used to buy the said motor vehicle.

6. Her further submission was that under the Proceeds of Crime and Anti-money Laundering Act No 51 of 2012 the said motor vehicle, the DPP is required to report cases of this nature to the Asset Recovery Agency, which is an office within the office of the Attorney General to file recovery proceedings in respect of the said motor vehicle. Ms Mwanza in further **submitted that there is no requirement in law to specify that the motor vehicle was to be an exhibit in the ongoing trial in that court.** According to her under section 348A of the Criminal Procedure Code, the right of appeal given to the Republic does not include appeals against the order sought to be revised. She also submitted that the release of the motor vehicle to the respondent/accused was improper because it could continue to depreciate due to usage. She has therefore submitted that the order releasing the vehicle to the respondent should be set aside and the same be placed in police custody pending the hearing and determination of that trial.

7. Mr Ombachi for the respondent/accused person opposed this application. He submitted that the magisterial order releasing the motor vehicle to the respondent/accused person was legally proper and should not be made the subject of revisional proceedings. According to him, the prosecution failed to tender evidence to connect the motor vehicle with the offences charged. **He further submitted that the prosecution never indicated that the motor vehicle was to be an exhibit in the trial that was ongoing in that court.** Furthermore, he submitted that if it was to be an exhibit, it would have been enough for the police to take photographs of the motor vehicle in order to avoid impounding the said motor vehicle in police custody. According to him the police could then thereafter release the motor vehicle to the respondent/accused.

8. In response to the prosecution submission that they had notified the Asset Recovery Agency to proceed with the recovery of the motor vehicle, Mr Ombachi submitted that the Asset Recovery Agency could only come into these proceedings, when a final determination had been made in a civil or criminal trial. He also submitted that there is no indication that the agency has filed recovery proceedings. It was his submission, that the prosecution should have appealed against the order releasing the motor vehicle to the respondent/accused person under section 364 (5) of the Criminal Procedure Code (Cap 75) Laws of Kenya.

9. He further submitted that the prosecution had also a right of appeal under section 348A of the Criminal Procedure Code, which I find was amended by section 19 of the Security Laws (Amendment) Act 2014, No 19 of 2014). It was also his submission that the mere prosecution of an accused person does not form the basis of impounding the said motor vehicle. Additionally, he submitted that the offences charged against the respondent/accused persons do not involve forfeiture of the motor vehicle. He also submitted that the Asset Recovery Agency may only come into the matter after the criminal trial is concluded. He concluded his submission by urging the court to uphold the magisterial order of 6th May 2016, while pointing out that the said motor vehicle had not been produced as an exhibit in the trial court.

10. In the light of the foregoing rival submissions, I find that the following are the **issues for determination.** Firstly, whether or not the prosecution had a right of appeal against the order complained of. Secondly, whether the subject motor vehicle was a potential prosecution exhibit in the ongoing trial in that court. Thirdly, whether or not the prosecution had disclosed that they were going to rely on the motor vehicle as an exhibit in proving their case against the respondent/accused. **Fourthly,** whether or not the order should be revised.

11. I have considered the rival submissions of both counsel. I find that it is common ground that the motor vehicle was going to be produced as an exhibit in the on-going trial in that court. It is also common ground that the motor vehicle had been ordered released to the respondent/accused by the trial

court on 6th May 2016. It is clear from the terms of the release order that the subject motor vehicle had not been produced as an exhibit in the trial court.

12. The first issue is whether or not the prosecution had a right of appeal against the order complained of. It seems to me that the prosecution had no right of appeal against the order that they are seeking to have set aside. This is clear from section 348A of the Criminal Procedure Code as amended, which provides as follows: “ ***When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge has been made by a subordinate court or the High Court, the Director of Public Prosecutions may appeal to the High Court or to the Court of Appeal as the case may be, from the acquittal on a matter of fact and law.***”

13. In view of the foregoing provisions of section 348A of the Criminal Procedure Code the right of appeal conferred upon the Republic through the DPP is only in relation to orders of acquittal made by the subordinate magisterial court, or where that court makes an order refusing to admit a complaint or formal charge, or where that court makes an order dismissing a charge. The order sought to be revised is not one of those three orders. It therefore follows that the prosecution through the DPP has no right of appeal against the order that is sought to be revised. It also follows that the Republic through the DPP is not a party who could have appealed within the meaning of section section 364(5) of the Criminal Procedure Code. The submission of Mr. Ombachi that the Republic through DPP is a party who could have appealed within the meaning of section 364(5) of the Criminal Procedure Code is not correct in law in view of these provisions. The reason is that the Republic through the DPP does not have a right of appeal against the order complained against under section 348A of the Criminal Procedure Code. The invocation of the revisional proceedings by the DPP is therefore legally sound.

14. The **second** and third issues are inseparable as they relate to the usage of of the motor vehicle as an exhibit in court and the Constitutional disclosure obligations of the prosecution. The issue for determination is whether or not the subject motor vehicle was a potential prosecution exhibit in the on going trial in that court. It was not clear as to whether the prosecution had timeously disclosed the said motor vehicle as a potential prosecution exhibit. This requirement is imposed by **Article 50 (2) (j) of the 2010 Constitution**. The provisions of that article provide in part that every accused has a right to a fair trial, which includes the right- : “***to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.***” In view of these mandatory provisions, it was contrary to the Constitution for Ms Mwanza to submit that the prosecution was not obliged in law to specify that the subject motor vehicle was going to be an exhibit. If the prosecution had not done so, then this was a constitutional failure on their part. Disclosure of the intended prosecution exhibits to be used at trial even at common law was obligatory, which common law is part of our laws by virtue of section 3 of the Judicature Act (Cap 8) Laws of Kenya. However, I find that this issue does not fall for consideration, because it is a common ground that the said motor vehicle was to be a prosecution exhibit. If the prosecution had not done so, then this was a failure on their part. In respect of the third issue for determination, I find in terms of the time frame that the prosecution was obligated to disclose that the said motor vehicle was going to be an exhibit well in advance of the trial in compliance with the Constitutional **requirements**.

15. **The fourth issue** is whether or not the order should be revised. It is clear from section 348A of the Criminal Procedure Code that the right of appeal conferred upon the Republic through the DPP is only in relation to an order of acquittal by the subordinate magisterial court court, or an order dismissing a charge made by a magisterial subordinate court, or order of that court refusing to admit a complaint or a formal charge into hearing. The order complained is not one of those orders that are appealable by the Republic. It therefore follows that the prosecution through the Director of Public Prosecutions (DPP), has no right of appeal against the order complained of.

16. Furthermore, it is also important to examine whether the order made by the magisterial court is one that is revisable by this court. The procedure for revision and matters that are subject to be revised are set out in section 362 of the Criminal Procedure Code. **Under section 362 of the Criminal Procedure Code**, this court is authorized to: “***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”.

17. It is in the light of the foregoing provisions that I have examined the order that is complained of by the DPP. According to the provisions of section 362 of the Criminal Procedure Code, this court is authorized to revise any findings, sentence or order recorded by the subordinate court and satisfy itself as to the regularity of any proceedings of the subordinate court. I find that the order complained of, is one that was ordered by the magisterial court and is therefore subject to revision as provided for under section 362 of the Criminal Procedure Court.

18. Having found that the order is revisable, the next issue to consider are the powers of the High Court on revision. Under section 364 of the Criminal Procedure Code, the powers of the High Court are set out as follows:

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

(b) In the case of any other order other 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 has had an opportunity of being heard either personally or by 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 lies from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

19. Its clear from the immediate foregoing provisions in section 364 (1) (b) of the Criminal Procedure Code that this court is authorized to revise any other order other than an order of acquittal and have that order altered or revised.

20. The terms of the foregoing provisions clearly indicate that the prosecution had no right of appeal against the order complained of, as submitted by Mr Ombachi. The next issue to be considered is whether the order complained of should be revised or not. 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.

21. The circumstances of the instant case arose in *R v Mombasa Development Limited and 4 others, being High Court at Nairobi, Criminal Revision No.112 of 1988*. In that case the accused were charged with 12 charges of forgery and trading without a licence with alternative charges of making false customs

entry in respect of motor vehicles imported into Kenya without proper documents. As the case was pending trial in the magisterial court, counsel for the first accused applied for the release of the motor vehicles to his client for preservation against wastage and safe custody due to the coastal climate, which allegedly facilitated wastage. The trial court ordered the motor vehicles to be released to the accused. The Republic through the Attorney General (now DPP) successfully applied in revision for the setting aside of the magisterial order on the ground that the prosecution required the motor vehicles to be produced as exhibits in the case against the accused person. I find that case to be of persuasive value and applicable to the instant case. In that case as in the instant case the motor vehicles were released to the accused person to avoid alleged wastage of the motor vehicles due to the alleged corrosive nature of the coastal climate. In the instant case, the motor vehicle was ordered released to the accused so: *“That the accused do have physical possession of m/v Reg No. KCD 112C to save it from the wear and tear due to immobilization of the engine.”* In the light of what I have stated in the foregoing paragraphs, I find that the trial court did not have jurisdiction to order the release of the subject motor vehicle to the accused, given that the prosecution intended to use it in proving their case against the accused person.

22. In view of foregoing findings I find it unnecessary to consider the other issues raised by the parties such as whether under the Proceeds of Crime and Anti-money Laundering Act No 51 of 2012, the DPP is required to report cases of this nature to the Asset Recovery Agency, to file recovery proceedings. It is equally not necessary to consider whether the prosecution ought to have taken photographs of the motor vehicle instead of impounding it and whether the recovery proceedings of the Asset Recovery Agency should be initiated at the end of the criminal trial as submitted by Mr. Ombachi. These issues are moot.

23. I find that the order made by the magisterial court should be revised. I hereby set it aside and in its place I order that the motor vehicle be placed in police custody pending the hearing and determination of the trial in that court.

Orders accordingly

J.M. BWONWONGA

JUDGE

29.06.16.