



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MACHAKOS**

**CRIMINAL REVISION NO. 18 OF 2016**

**REPUBLIC.....APPLICANT**

**VERSUS**

**JACKLINE KAMENE MBITHI.....RESPONDENT**

**RULING ON REVISION**

P.T.M. Kisongoa & Company Advocates act for the two Applicants herein, namely Kimuya Mbuvi and Patrick Kyalo, and have requested for revision of the orders made in **Kilungu Criminal Case No 131 of 2015- R. vs Jackline Kamene Mbithi**. The said request is in a letter addressed to the Court dated 29<sup>th</sup> April 2016 wherein the said Applicants requested the Court to examine the record of the said criminal proceedings to satisfy itself as to the correctness and propriety of the order made or recorded, and the regularity of the proceedings resulting in the said order. They also sought that the execution of the order be stayed pending revision or review.

The Accused in the said criminal case, Jackline Kamene Mbithi, was charged with the offence of obtaining credit by false pretences contrary to section 313 of the Penal Code, the particulars of which were that on 1<sup>st</sup> December 2014 at Kasunguni village, Kee Location, Kilungu Sub-county within Makeni County, with intent to defraud, she obtained from Onesmus Muthenya Muema the sum of Kshs 37,500/= by falsely pretending to sell to the said Onesmus three cattle. The Accused person pleaded not guilty to the charge.

The trial magistrate Hon. E. Onzere R.M., after hearing four prosecution witnesses found that the Accused Person had a case to answer, and put her on her defence. The Accused called three defence witnesses. After trial the trial magistrate acquitted the accused person of the charge under section 215 of the Criminal Procedure Code, and while noting that the complainant had already paid the Accused Person Kshs 37,500/= for the 3 head of cattle which he had bought from the Accused, and which were the subject of a family dispute, ordered as follows pursuant to the provisions of section 177 of the Criminal Procedure Code:

- 1. The Accused does return the complainant Kshs 37,500/= being the purchase price of the 3 head of cattle**
- 2. The witnesses who testified in Court including PW3 testified that that the 3 herds of cattle are with Kimuya Mbuvi and Patrick Kyalo. I direct that Kimuya Mbuvi and Patrick Kyalo do hand over the cattle left behind by the deceased to DW2, John Mbithi, who is the surviving son of the deceased and the said John Mbithi will hold the cattle on behalf of all the surviving**

**children of the deceased until the the dispute surrounding them is resolved. John Mbithi should not sell or dispose off any cattle until the dispute surrounding the deceased properties is resolved by all the interested parties.**

The Applicants claim that the trial magistrate made orders involving parties who were not parties to the criminal case in a civil matter, and after the dispute involving the cattle had been handled by the chief and District Officer who resolved that the 3 head of cattle be returned to Patrick Kyalo by the person who bought them from the Accused Person. Further, that the cattle are in the possession of Patrick Kyalo and not Kimuya Mbuvi who cannot therefore return that which he does not possess. Lastly, that the orders are against the rules of natural justice as the Applicants were not given the opportunity to defend themselves on their right of ownership and possession of the cattle.

Ms. Rono, the prosecution counsel submitted during the hearing that she would not respond to the application. The Accused Person filed a replying affidavit in response to the Application that she swore on 3<sup>rd</sup> June 2016, wherein she averred that she has not lodged an appeal or revision in the criminal proceedings in the trial Court, and neither was she represented by Kisongoa Advocate in the said proceedings, who also did not represent any of the parties therein. Further, that the said criminal proceedings were not brought as a private prosecution, hence the revision before the Court is not proper and is bad in law.

Under section 362 of the Criminal Procedure Code, this 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. The provisions of section 364 of the Criminal Procedure Code provide the powers of the High Court upon such revision are as follows:

**“(1) 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—**

**(a) 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.”**

The powers granted by section 362 of the Criminal Procedure Code may be exercised by the Court *suo*

*moto*, which also implies that any person affected by the said orders can move this Court to so act. This Court is in this respect being asked to revise the orders made as regards the return of the 3 head of cattle to DW2, and not the order of acquittal, taking into account the proceedings in the trial Court. This is a power that can be legitimately exercised by this Court under section 364 of the Criminal Procedure Code. The revision application is accordingly properly before this Court.

The trial magistrate in granting the impugned orders held that she was exercising the powers provided under section 177 of the Criminal Procedure Code which provides for restitution of property as 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.”**

Orders of restitution and restoration of property in criminal proceedings are, under section 177 of the Criminal Procedure Code, only applicable to property which is taken from an accused person during the criminal proceedings. The property in question in the lower court proceedings was the sum of Kshs 37,500/= which the Accused person is said to have fraudulently received from the complainant, and which was the subject of the charge of the trial court. No evidence was adduced in the trial Court to show that the 3 heads of cattle that were the subject of the impugned orders of the lower court were in the possession of the Accused person, nor were the 3 head of cattle the subject of the criminal proceedings, and the trial Court to this extent erred in ordering their return under section 177 of the Criminal Procedure Code.

In addition, while section 177 of the Criminal Procedure Code does not exclude third parties from restoring property taken from an accused person, the Court can only make such an order against a third party in the clearest of cases. It was in this regard held in **R. vs Cap Van International Limited and Another (2004) 2 KLR 348**, that section 177 of the Criminal Procedure Code can only be invoked after it has been established beyond reasonable doubt that the goods in question belong to the Applicants, and when the goods in question have been produced in evidence before the Court. Likewise, in **Praji Vithaldas vs The Crown (1939-1950) 7 ZLR 1** it was also held that an order for restitution ought not be made without giving any possible claimant an opportunity to be heard.

A perusal of the proceedings of the lower Court shows that the Accused Person received money from the complainant for the sale of 3 head of cattle, which were the subject of a family dispute as to who was entitled to inherit the said cattle which belonged to Nguli Mbuvi since deceased. The dispute from the record appears to have been as between Patrick Kyalo, a grandson of the said deceased, and John Mbithi who was a son of the said deceased and husband of the Accused Person, and who was called to testify for the Accused Person as DW2. Kimuya Mbuvi who is one of the Applicants, and the brother of the deceased Nguli Mbuvi, did give evidence during the trial as a prosecution witness to shed light on the dispute as regards the said cows. However, one of the Applicants, Patrick Kyalo, who claims to have possession of the said cows and to have inherited the cows was not called as a witness in the criminal proceedings in the trial Court.

Therefore, to the extent that the 3 heads of cattle ordered to be returned by the trial magistrate were the subject of a family dispute involving the Accused Person, her husband, and Patrick Kyalo, and to the extent that the Patrick Kyalo was not heard before the orders for the return of the cattle was made, the said order for return of the 3 head of cattle was made in error.

The order by the trial Court made on 3<sup>rd</sup> November 2015 by Hon. Onzere E.M directing that Kimuya Mbuvi and Patrick Kyalo do hand over the cattle left behind by the deceased to DW2, John Mbithi, who is the surviving son of the deceased; and that the said John Mbithi will hold the cattle on behalf of all the surviving children of the deceased until the dispute surrounding them is resolved; and that John Mbithi should not sell or dispose off any cattle until the dispute surrounding the deceased properties is resolved by all the interested parties; is accordingly hereby set aside.

For the avoidance of doubt, the orders by the trial magistrate of acquittal of the Accused Person, and that the Accused does return to the complainant Kshs 37,500/= being the purchase price of the 3 head of cattle are hereby upheld.

This ruling and orders herein to be furnished to the Hon. E. Onzere, Resident Magistrate at Kilungu Law Courts; the Prosecution; the Accused Person herein namely Jackline Kamene Mbithi; John Mbithi who was DW2 in the criminal proceedings in the trial Court; and the Applicants herein without delay.

**DATED AT MACHAKOS THIS 31<sup>st</sup> DAY OF OCTOBER 2016.**

**P. NYAMWEYA**

**JUDGE**