



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (MILIMANI LAW COURTS)**

**Criminal Revision 131 of 2011**

**FRANCIS MBUGUA MUKUNDI .....1<sup>ST</sup> APPLICANT**

**FELIX KIOKO MWATHI .....2<sup>ND</sup> APPLICANT**

**CHARLES KIRKSTONE AMEYO .....3<sup>RD</sup> APPLICANT**

**HENRY MWANGANGI .....4<sup>TH</sup> APPLICANT**

**ROY MUGANDA .....5<sup>TH</sup> APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

**1. The application before me is brought by way of a letter dated 4<sup>th</sup> March 2011, by the applicants:**

1. Francis Mbugua Mukundi
2. Felix Kioko Mwathi
3. Charles Kirkstone Ameyo
4. Henry Mwangangi
5. Roy Noah Mugunda

They have invoked the supervisory jurisdiction of the High Court under the Constitution, and **Section 362** of the **Criminal Procedure Code**, and are asking this court to determine the propriety of the judgment made by the learned trial magistrate, in **CM cri. Case No. 2276 of 2009 Republic v Gerald Neville Ogutu**, on 31<sup>st</sup> December 2010. In the said case the learned trial magistrate forfeited to the state, motor vehicle registration No. KBD 413 D, the subject matter of the case.

2. Learned state counsel, Mr. George Muriithi submitted that the kind of redress sought by the applicants is that of a civil nature, and that therefore, this court has no jurisdiction to grant it. This is because the applicants wanted the aforesaid vehicle which was bought by the accused person, and valued at 1.3 million shillings, to be sold by the applicant's and the proceeds be distributed among them in the ratio which they were defrauded.

3. I have perused the grounds of the application, the submissions of the learned state counsel and the record from the trial court, and I note that the learned trial magistrate made findings of fact that:

*(i) The accused fraudulently obtained from the applicants various sums of monies as hereunder set out, on the false supposition that he was in a position to sell them various unregistered motor vehicles (Toyota Sharks);*

- a) Francis Mbugua Mukundi           Kshs.520,000.00
- b) Felix Kioko Mwathi                Kshs.170,000.00
- c) Charles Kirkstone Ameyo        Kshs.340,000.00
- d) Henry Mwangangi                 Kshs.370,000.00
- e) Roy Noah Muganda                Kshs.320,000.00

*(ii) The accused in his sworn evidence admitted having received the subject monies and stated that he remitted the same to a car dealer, namely Prime Motors;*

*(iii) The accused fraudulently obtained well over Kshs. one million seven hundred thousand (Kshs.1,700,00) from the applicants out of which he utilized Kshs.1.3 million towards the purchase of motor vehicle registration number KBD 413 D for his own use and put the balance thereof towards his own personal use.*

There is therefore clear evidence that the accused pooled the monies received from the applicants, and executed a sale agreement, (PExb 12), with the car dealer, namely Prime Motors from whom he purchased the motor vehicle registration number KBD 413 D (Exh.6). The learned trial magistrate convicted the accused person on each of the five counts and fined him a total of Kshs.550,000/= and in default to serve a total of 5½ years imprisonment. She forfeited the motor vehicle KBD 413 D to the state.

4. The applicants state in their letter that the accused has to date, never refunded the monies he fraudulently obtained from them. That the motor vehicle registration KBD 413 D, is presently lying stationary within the court precincts and is inevitably deteriorating in value. **Section 177 (a)** of the **Criminal Procedure Code** provides that 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”.***

**Section 178(7)** goes further to elucidate what the term “**property**” encompasses as follows:

***“In this section and in section 177, “property” includes, in the case of property regarding which the***

*offence appears to have been committed, not only property which was originally in the possession or under the control of a person but also property into which or for which it may have been converted or exchanged and anything acquired by the conversion or exchange whether immediately or otherwise”.*

5. It is therefore ordered that the orders of forfeiture of motor vehicle registration No. **KBD 413 D**, the subject matter in **CM Cri case No. 2276 of 2009**, issued on 31<sup>st</sup> December 2010, be and are hereby revised. The said motor vehicle be and is hereby released to the five applicants to sell and distribute the proceeds thereof equitably amongst themselves in the ratios of the sums of monies obtained from each by the accused person.

It is so ordered.

**SIGNED DATED** and **DELIVERED** in open court this 25<sup>th</sup> day of *July* 2012.

**L. A. ACHODE**

**JUDGE**