

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL REVISION NO. 7 OF 2011

ASHFORD MUTWIRI MAKANGA.....APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

(Arising from Nyeri Chief Magistrate's Court Criminal Case No 151 of 2011)

HUSSEIN ABDI AHMED.....INTERESTED PARTY

RULING ON REVISION

The proceedings relating to **Nyeri C.M.C.Cr. Case No. 151 of 2011 R =Vs= Ashford Mutwiri Makanga** were presented to this court for my perusal. In exercise of this court's power of revision under *Section 362* of the Criminal Procedure Code, I perused the aforesaid proceedings. The record shows that the learned chief Magistrate was prompted to place the aforesaid file before this court by the letter dated 15th May 2011, written by Charles Kariuki, learned advocate for one Hussein Abdi Ahmed, Interested Party, being the owner of motor vehicle registration KAL 586X.

The record shows that one Ashford Mutwiri Makanga, hereinafter referred to as the Applicant, was convicted on his own plea of guilty for the offence of harbouring aliens contrary to *Section 13 (1) (i)* of the Immigration Act (Cap. 172 L.o.K.). He was then sentenced to serve 12 months imprisonment. The particulars of the offence are stated to be that on 14th February 2011 at about 1.40 p.m. along Thika-Nyeri highway, in Kiambu County, in the Republic of Kenya, while knowing that six aliens were unlawfully present in Kenya, transported them in motor vehicle KAL 586X Toyota Corolla from Somalia. Upon his conviction and sentence, the court prosecutor urged the trial court to issue an order to forfeit to the State the aforesaid motor vehicle because the owner could not be traced. In her brief ruling the learned Chief Magistrate granted the orders. It would appear, the owner of the motor vehicle got wind of what had happened hence he instructed the firm of Charles Kariuki & Co. Advocates to write the letter of protest dated 15th May 2011. In the aforesaid letter, it is alleged that the learned Chief Magistrate had no powers to issue the order of forfeiture under *Section 13(1)(d)* of the Immigration Act.

This court exercises its power of revision under *Section 362* of the Criminal Procedure Code in order to determine the correctness, legality or propriety of any findings, sentence or order recorded or passed and as to the regularity of any proceedings before the subordinate court. It is not in dispute that the learned Chief Magistrate issued an order forfeiting to the State motor vehicle registration No. KAL 586X. It is also not in dispute that the order was issued without hearing the owner of the aforesaid motor vehicle. It is alleged that the Police were unable to trace the owner. In her ruling delivered on 26th May 2011, the learned Chief Magistrate was of the view that the conduct of the owner showed he lacked interest in the motor vehicle hence it lent credence to the prosecutor's assertion. The question which should be dealt with at this stage is whether or not the provisions of *Section 389A* of Criminal Procedure Code were complied with before the order was issued? In my view, the provisions of the aforesaid section were not complied with i.e. no notice was issued upon the owner and or a person with interest on motor vehicle registration No. KAL 586X to show cause why the motor vehicle should not be forfeited to the State. For that reason alone, the order of forfeiture must be set aside. I hereby set aside the order and

direct that the matter be remitted back to the learned Chief Magistrate to deal with the issue in strict compliance with *Section 389A* of the Criminal Procedure Code.

Dated and delivered at Nyeri this 30th day of June 2011.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Macharia holding brief Kariuki for the Applicant.