



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

REVISION NO. 18 OF 2010

(From original SPM Migori in Criminal Case No 735 of 2009)

GILBERT ATINO.....APPLICANT

VERSUS

STATE.....RESPONDENT

RULING ON REVISION

On 20th September, 2010 M/s omangi, Musanga & Co Advocates, wrote a letter to this court, presumably on behalf of **Geonell Car Hire**, owner of motor vehicle registration number **KBH 160 R**, a Nissan Sunny by make. In the said letter the advocates drew this court's attention to a ruling that was delivered in **Criminal case No. 739 of 2009** before the Senior Principal Magistrates Court, Migori. The ruling was delivered on 8th September, 2010 by S. M. Shitubi, SPM.

The ruling was in respect of an application dated 19th May, 2010 by one **Riyaz Tajdin Dhanji** through M/s omonde Kisera. In the said application the applicant sought release of the said motor vehicle pending hearing and determination of a case in which **Samuel Gilbert Atino** was charged with trafficking narcotic drugs contrary to **Section 4 (a)** of the **narcotic Drugs and psychotropic Substances (Control) Act, 1994**. The particulars of the offence were that on the 11th day of August, 2009 at Pinyole area in Migori District within Nyanza Province the accused was found trafficking 2400 rolls of bhang with a street value of kshs. 1,200,000/= in the aforesaid motor vehicle. The said case is still pending before the trial court.

The application for release of the motor vehicle was made pursuant to the provisions of **sections 19 and 20** of the said **Act**. The application was supported by an affidavit sworn by **Riyaz tajdin Dhanji**, the applicant, where he stated that he is the registered owner of the said motor vehicle. He annexed to his affidavit a copy of the vehicle Registration Book. The applicant further stated that on 30th July, 2009 he rented out the said motor vehicle to Geonell Car Hire Services for its car Hire business at a consideration of Kshs. 30,000/= per month. The applicant was informed by Geonell car Hire Services that on 30th July, 2009 one James mwangangi hired the car but did not return it on the due date. It was later realized that the car had been detained at Migori Police station after it was found transporting the aforesaid rolls of bhang.

The applicant added that he was not at all connected to the said drugs and neither did he know the said James Mwangangi or the accused herein. He urged the trial court to release to him the motor vehicle since he was an innocent owner thereof.

The accused opposed the application and told the trial court that at the time the vehicle was given out

to the car hire firm it was not in the name of the applicant. He said the vehicle was also involved in another case pending before Macalder court being criminal Case No. 355 of 2009. He added that one Kenneth Ouma Agel who owned the car hire firm brought the same Registration book but it was rejected. He said that the owner of the motor vehicle should be investigated.

The accused further alleged that at the Central Police Station under OB No 65/14/09 the same vehicle was reported for investigation. It was said that it had been given to one Kenneth Amoum on 10th August, 2009 but he failed to return in within 3 days as requested. Later Kenneth Ogola reported to Industrial Area Police Station that the vehicle was with the accused at Migori.

When the trial magistrate adjourned the hearing of the application for 3 days, upon resumption of the hearing the prosecution told the trial court that investigations had been finalized and it had been determined that the applicant was the owner of the motor vehicle and had been exonerated by the police as regarding the drug trafficking charges. The prosecution indicated that it had no objection to release of the car to him but requested that it be photographed and the original log book retained.

In her ruling, the learned trial magistrate observed that nobody from Geonell Car Hire testified or filed an affidavit and said that the car had been hired out to a mysterious business. She also took into account the accused's sentiments as above. She concluded as follows:

“For the court at this stage the events leading to the impounding of this vehicle loaded with cannabis can only be related through testimonies of witnesses. It's at that stage that the court will have a clear picture of the role played by the owner/s of this vehicle. Proof of ownership alone is not sufficient reason to warrant release given the provisions of the law affecting such a vehicle. For the court to reach a proper conclusion I decline to release this vehicle at this stage.”

That is the ruling which this court was urged to revise and order release of the motor vehicle by M/s Omangi Musanga & Company for Geonell car Hire.

Under **Section 20 (1)** of the Act, any machinery, equipment or item used for the commission of any offence prescribed under the Act shall be forfeited to the Government.

However, the Proviso thereto states as hereunder:

“Provided that where, on application made by the person who was the owner of the conveyance to the court in which any prosecution for any offence under this Act or before which any proceedings under this Act for the forfeiture and condemnation of any conveyance, not being a proceeding under part IV is pending, the court is satisfied beyond reasonable doubt that –

- (a) **the person who was the owner of the conveyance; and**
- (b) **.....**

when it was made use of for such conveyance, was not concerned in or privy to such use, the conveyance shall be restored to the owner by the court.”

The proceedings before the trial court are still going on. For the trial magistrate to order release of the motor vehicle used in transporting the narcotic drugs to the applicant, she had to be satisfied **beyond reasonable doubt** that the owner of the motor vehicle was not concerned in any way or even privy to its use. The learned magistrate had to exercise her judicial discretion based on the facts and evidence laid before her.

The accused made serious allegations regarding the applicant and the motor vehicle. He may not have been truthful but his sentiments must have created serious doubts in the mind of the learned trial

magistrate. The accused could not be cross examined on his allegations because what was before the court was an application. I believe the accused has not yet been placed on his defence.

The learned trial magistrate gave her reasons for rejecting the applicant's application. Although the applicant's advocate now faults the trial court, it was not demonstrated that the magistrate abused her discretion or acted on wrong principles. She was simply not satisfied beyond reasonable doubt that the applicant was not privy to the use of the motor vehicle. She pointed out that the proprietor(s) of Geonell Car Hire had not sworn any affidavit at all. In her considered view, there were issues that could only be resolved upon hearing all the witnesses.

I do not therefore think that the learned trial magistrate can be faulted for that decision. Consequently, I will not interfere with the same. The trial should be expedited so that the issue of release of the motor car can be determined conclusively upon consideration of all the evidence.

DATED, SIGNED AND DELIVERED ON 1st DAY OF OCTOBER, 2010.

D. MUSINGA
JUDGE