



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**Criminal Misc. Appli. 36 of 2007**

**DAVID OUMA AWORI ..... APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING**

The application before me is for restitution. The applicant was the 3<sup>rd</sup> accused in Mumias Senior Resident Magistrate's Court, **Criminal Case No. 1476 of 2004**.

After a full trial, the applicant and his co-accused were all acquitted, for lack of sufficient evidence. The trial court held that the prosecution had failed to call important witnesses who could have helped to establish the case against the accused.

Having been acquitted by the trial court, the applicant now asks this court to order the Divisional Criminal Investigation Officer (D.C.I.O.), Butere, to hand over to him, the items which the police removed from his house at the time they arrested him.

It was the applicant's case that on 29<sup>th</sup> April 2005, PW4, who was the arresting officer, admitted being in possession of the applicant's property.

The applicant also told this court that on 30<sup>th</sup> December 2004, the Investigating Officer (I.O.), also told the trial court that the applicant's property was being held by the police.

Thereafter, on 29<sup>th</sup> June 2005, when the trial had been concluded, the applicant says that the trial court ordered the D.C.I.O. to surrender to the applicant, the property belonging to him, and which the police had removed from his house.

Notwithstanding that order, the trial court is said to have subsequently made a contradictory order, on 30<sup>th</sup> November 2005. The said contradictory order was to the effect that the applicant should sue the Attorney General.

As far as the applicant was concerned, the police had acted in a malicious, inhuman and unconstitutional manner, as there was no probable cause for the police detaining his property. Having done so, the police are said to have tried to cover-up their actions, by coming up with "**tramped-up evidence**", to try and

defeat the orders requiring them to surrender the goods to the applicant.

This court was therefore asked to order the D.C.I.O. Butere, to comply with the court orders made on 29<sup>th</sup> June 2005.

In answer to the application, the learned Senior State counsel, Mr. Daniel Karuri, submitted that the trial court did not order the D.C.I.O. to surrender the applicant's property, to the said applicant. As far as the state was concerned, the trial court had only directed the D.C.I.O. to open an inquiry file, with a view to investigating the applicant's assertions. In the meantime, the trial court is said to have advised the applicant to sue the Attorney General.

When the court asked the state counsel if the D.C.I.O. had completed his investigations, the answer was that he was not aware.

At that point, this court ordered the D.C.I.O. to file an affidavit, explaining the steps he had taken, to comply with the orders requiring him to open an inquiry file.

The affidavit which was filed by the state was not made by the D.C.I.O. Instead, it is Mr. Barnabas Kinyor, the Deputy Officer-in-charge of the Kakamega Main Prison, who filed an affidavit. In his said affidavit, Mr. Kinyor explained that as at 7<sup>th</sup> November 2005, he was the security officer at the said prison.

Mr. Kinyor says that he was instructed by his immediate supervisor, SSP. George Okunu, to have the applicant herein interviewed. The need for the said interview arose from a letter from Provincial C.I.D. Officer, Western Province. The letter from the Provincial C.I.D. is dated 3<sup>rd</sup> November 2005, and was annexed to Mr. Kinyor's affidavit.

By the said letter, the P.C.I.O. Western wanted to exhaustively investigate the complaints which the applicant had made against the police. The P.C.I.O therefore directed the Officer Commanding the Kakamega Main Prison to allow a police officer, by the name of Wilson Tenai, to interview the applicant, and obtain his statement.

Mr. Kinyor accompanied Mr. Wilson Tenai, for the interview of the applicant. However, according to Mr. Kinyor, the applicant declined to be interviewed.

The applicant has told this court that the affidavit of Mr. Kinyor had no basis. His reason is that he did not feel safe to record any evidence outside the trial, because he had lost confidence in the police officers concerned.

To his mind, there was already sufficient evidence against the said police officers. The evidence is said to be contained in the record of the proceedings before the trial court.

Having given due consideration to the application, I note that the complaint by the applicant was directed against the police based at Butere. According to the applicant, the Butere D.C.I.O. did admit that the applicant's property was in the hands of the police. The admission is said to be contained at page 2 of the record.

However, a perusal of page 2 of the record simply indicates that the Deputy D.C.I.O. said;

***“Some of the things form exhibits in this case and others in Vihiga court. The arresting officer could shed more light.”***

On that date, the applicant had complained that the police took away his following properties;

- i. Samsung phone SG700, valued at Kshs.26,500/=

- ii. Kshs.85,000/=.
- iii. U.S. Dollars 3,000.
- iv. Sony Video hand camera, model TRV.461.
- v. One wrist watch.
- vi. Radio worth Kshs.15,000/=.

Later, when PW5 testified he said;

***“I produced all I had as exhibits herein. The same were being held at Vihiga Police Station. I appeared in court personally over the items. I said the things could be exhibits in various cases.”***

Given the fact that the applicant herein was charged with different criminal offences, before different courts, this court is unable to make any conclusive findings without the benefit of the records of the proceedings in all those cases. Whilst it is true that in Mumias SRM Criminal Case No. 1476 the applicant was acquitted, I am not able to make an informed decision whether or not the items allegedly in the hands of the police, were produced as exhibits in other cases.

My conclusion is informed, inter alia, by the fact that whereas the applicant wants this court to enforce the orders made by the trial court on 29<sup>th</sup> June 2005, the orders made on that date did not order the police to surrender any property to the applicant. The order was in the following terms;

***“Summons to issue for Insp. Juma to bring to this court items mentioned in the previous order of 8/7/05 which should be attached in this court.”***

As that order was being made on 29<sup>th</sup> June 2005, I am completely at a loss about how it could made reference to a

***“previous order of 8/7/05.”***

When the case was in court on 8<sup>th</sup> July 2005 the trial court made the following order;

***“D.C.I.O. VIHIGA to furnish this court with a list of items recovered from the 3<sup>rd</sup> accused during arrest detailing which have been produced as evidence in any case and those which have not, so that court can make appropriate order.”***

Once again, the D.C.I.O. Vihiga was not ordered to surrender to the applicant, any property. He was only directed to furnish the trial court with a list of the items recovered from the applicant.

When the D.C.I.O. failed to respond to the orders of the court, the learned trial magistrate issued an order for his arrest. The issuance of the warrant for the arrest of the D.C.I.O. resulted in his prompt appearance before the court, on 5<sup>th</sup> October 2005. He then told the court that none of the items cited by the applicant, were ever taken to the police station. Therefore, the D.C.I.O. said that the only person who could have been in a position to explain about the said items would be the Investigating Officer, Chief Inspector Lumbasi.

In the light of that explanation by the D.C.I.O., the learned trial magistrate directed the P.C.I.O. Western Province to investigate what happened to the items.

In my considered view, the orders of the trial court, in the circumstances prevailing, were very reasonable. I say so because none of the police officers who gave evidence conceded that they or any of their colleagues took possession of the items cited by the applicant. At most, the police admitted that they

did take some items.

On 30<sup>th</sup> December 2004 the applicant sought the particulars of the items which the police had. At that time, the trial court told the applicant that he could put questions about the particulars of the said items, to the arresting or the investigating officers, during the hearing.

As the police did not admit to having possession of the items specified by the applicant, this court cannot insist that the police should produce the items simply because the applicant said that the police have them.

Secondly, the P.C.I.O. Western Province, did comply with the order requiring him to investigate the matter further. Regrettably, the applicant refused to co-operate with the officer who was sent to interview him, in prison.

In the event, this court cannot order the police to produce items which they have not been proved to be holding.

By refusing to co-operate with the investigator who was mandated by the P.C.I.O. Western Province, the applicant has nobody to blame but himself. Secondly, the applicant was advised by the trial court, that he could sue the police, through the Attorney General, even whilst the inquiry by the P.C.I.O. was ongoing. Again, the applicant has not acted on that advise.

In the event, I decline to issue the orders for restitution, as this court is unable to make an informed decision that the items complained about were in the hands of the police.

However, I can and do hereby order the P.C.I.O. Western to open an inquiry into the complaints raised by the applicant. The P.C.I.O. should file a copy of his report with this court within the next four (4) months from today.

Finally, I direct that a copy of this Ruling be made available to the following persons, for their information and appropriate action;

- (a) The Commissioner of Police;
- (b) The Hon. Attorney General;
- (c) The Director, Kenya Anti-Corruption Commission.

It is so ordered.

*Dated, Signed and Delivered at Kakamega, this 28<sup>th</sup> day of April, 2009.*

**FRED A. OCHIENG**

**J U D G E**